Supreme Court, U.S.
FILED

02 334 JUL 29 2002

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

SCOTT FALLO AND KASEY FALLO,

Petitioners,

v.

PICCADILLY CAFETERIAS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Stephen I. Dwyer
Counsel of Record
Susanne Cambre
Michelle Mayne Davis
Dwyer & Cambre, APLC
1524 W. Causeway Approach
Mandeville, LA 70471
(985) 624-3307
Attorneys for Petitioners

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

44 pp

QUESTIONS PRESENTED FOR REVIEW

1. Should an analysis of whether to award attorney's fees in ERISA actions include a presumption that the prevailing party recover attorney's fees?

2. Is the five-factor analysis utilized by the Fifth Circuit when determining whether to award attorney's fees to a prevailing party in an ERISA action consistent with the purpose of the fee-shifting statute?

3. Does the use of the five-factor analysis when determining whether to award attorney's fees under ERISA operate to preclude a settling party from receiving an award of attorney's fees?

4. Is a two-year delay in evaluation of claims for benefits legally due under and ERISA claim tantamount to bad faith on the part of a conflicted claims administrator?

5. Is a plan administrator entitled to rely solely on the submissions of a claimant when denying claims or does the administrator have a duty to diligently investigate the claim?

6. Does the failure of a conflicted claims administrator to diligently investigate claims for benefits in a timely matter result in bad faith?

PARTIES TO THE PROCEEDING

Kasey Fallo (Petitioner)

Scott Fallo (Petitioner)

Piccadilly Cafeterias, Inc. (Respondent)

Dwyer & Cambre (Counsel for Petitioners)
Stephen I. Dwyer
Susanne Cambre
Michelle Mayne Davis

Hailey, McNamara, Hall, Larmann & Papale, LLP (Counsel for Respondent)
Julie D. Robles
John T. Culotta

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDINGS ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISION INVOLVED 1
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 4
ARGUMENT 5
CONCLUSION 19
APPENDIX
CIRCUIT COURT ORDER (5/1/02) 1a
DISTRICT COURT ORDER (8/16/01) 3a
DISTRICT COURT ORDER (9/26/01) 17a

TABLE OF AUTHORITIES

CASES

ALYESKA PIPELINE SERVICE CO. V. WILDERNESS SOCIETY, 421 U.S. 240, 258-59, 95 S.CT. 1612, 1622, 44 L.ED. 141, 154 (1975).....8

BAETEN V. VAN ESS, 474 F. SUPP. 1324, 1332 (E.D. WIS. 1979).....8

BUGHER V. CONSOLIDATED X-RAY SER. CORP., 705 F. 2D 1426, 1436 (5TH CIR. 1983), CERT. DEN. 105 S.CT. 3524 (1985).....9

DONOVAN V. CUNNINGHAM, 716 F.2D 1455, 1475 (5TH CIR. 1983), CERT. DENIED, 467 U.S. 1251, 104 S.CT. 3533, 82 L.ED.2D 839 (1984).....5

EAVES V. PENN, 587 F.2D 453 (10TH CIR. 1978).....5

FALLO V. PICCADILLY CAFETERIAS, INC., 141 F.3D 580 (5TH CIR. 1998).....8

FIRESTONE TIRE & RUBBER CO. V. BURCH, 489 U.S. 101, 115, 109 S.CT. 948, 956, 103 L.ED. 2D 80 (1989).....7

GIBBS V. GIBBS, 210 F.3D 491, 504 (5TH CIR. 2000).....6

GOODEN V. PROVIDENT LIFE & ACCIDENT INSURANCE CO., 250 F.3D 329, 333 (5TH CIR. 2001).....15

IRON WORKERS LOCAL #272 V. BOWEN, 624 F.2D 1255, 1266 (5TH CIR. 1980).....4, 5, 6

LANDRO V. GLENDENNING MOTORWAYS, INC., 625 F. 2D 1344, 1356 (8TH CIR. 1980).....9

NATIONAL COMPANIES HEALTH BENEFIT PLAN V. ST. JOSEPH'S HOSPITAL OF ATLANTA, INC., 929 F.2D 1558, 1575 (11TH CIR. 1991).....6, 17

NEMOURS & CO., 966 F.2D 1011, 1017 (5TH CIR. 1992)6, 8, 13, 14

PENN V. HOWE-BAKER ENGINEERS, INC., 898 F.2D 1096, 1100 (5TH CIR. 1990) 7

ROIG V. LIMITED LONG TERM DISABILITY PROGRAM, 2000 WL 1176522 (E.D. LA. AUGUST 4, 2000).....18

VEGA V. NATIONAL LIFE INSURANCE SERVICES, 188 F.3D 287, 298 (5TH CIR. 1999) 13, 14

STATUTES

28 USC §1254(1) 1

28 USC §1291 1

29 USC §1001 .....1, 2

29 USC §1132 .....5, 20

29 USC §1132(g)(1) 1, 5

Other AUTHORITIES

MARK HOWARD BERLIND, 71 CORNELL L. REV. 1037 (JULY, 1986).....5

Scott Fallo and Kasey Fallo, Petitioners, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

I. OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit dated May 1, 2002 is set forth in the Appendix, p. 1a. The decision on the record from the District Court of the Eastern District of Louisiana dated August 16, 2001 is set forth in the Appendix, p. 3a.

II. JURISDICTION

Subject matter jurisdiction for granting of attorney's fees and costs in an action for health insurance benefits under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") is found in the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 USC §1001, et seq.

Subject matter jurisdiction for the United States District Court for the Eastern District of Louisiana is found also in ERISA. Subject matter jurisdiction for the Court of Appeals for the Fifth Circuit was invoked through ERISA and 28 USC §1291.

The jurisdiction of this Court is invoked under 28 USC §1254(1).

III. RELEVANT PROVISIONS INVOLVED

Employee Retirement Income Security Act, 29 USC §1132(g)(1).

> (g) Attorney's fees and costs; awards in actions involving delinquent contributions
>
> (1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action

to either party.

IV. STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Courts Below

Plaintiffs, Scott Fallo and his wife, Kasey Fallo, filed this action on February 10, 1994, in Louisiana state court against Mr. Fallo's former employer, Piccadilly Cafeterias, Inc. ("Piccadilly"), claiming entitlement to extended health insurance benefits from Piccadilly under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). Piccadilly removed the action to the United States District Court for the Eastern District of Louisiana pursuant to that court's federal question jurisdiction since the action involved a controversy arising out of and governed by the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001, et seq., and COBRA.

Piccadilly then filed its first Motion for Summary Judgment which was heard on June 14, 1994, the result of which was a judgment partially in Piccadilly's favor dismissing certain portions of the Fallos' claims. The trial court, however, denied a portion of Piccadilly's Motion for Summary Judgment and preserved the Fallos' right to pursue their claim for 11 months of extended health insurance coverage provided by COBRA.

Thereafter, Piccadilly reurged its Motion for Summary Judgment, the result of which was an order dated March 17, 1995, again denying the Motion for Summary Judgment. Piccadilly moved to stay the litigation pending the outcome of a determination by the Social Security Administration of Kasey Fallo's disability, which stay was granted by the trial court.

The Social Security Administration initially denied Mrs. Fallo's application for disability benefits filed in April 1994. The Fallos appealed the denial and the Social Security Administration determined on November 27, 1996, that Kasey Fallo had been disabled between March 1993 and October 1994.

After that decision became final, the Fallos filed a Motion for Summary Judgment asserting their entitlement to the additional 11 months of health insurance coverage provided by COBRA upon the onset of the disability. Piccadilly filed a Cross-Motion for Summary Judgment, denying that the Fallos were entitled to extended benefits alleging the Fallos did not apply to the Social Security Administration for a disability determination until six (6) months after the initial 18 month COBRA coverage period had expired. The trial court denied the Fallos' Motion for Summary Judgment and granted Piccadilly's Cross-Motion on July 29, 1997.

The Fallos appealed to the United States Fifth Circuit Court of Appeals, which reversed the grant of summary judgment in favor of Piccadilly and rendered judgment in favor of the Fallos on the coverage issue on May 29, 1998. The Fifth Circuit held that the Fallos were entitled to rely upon Piccadilly's Summary Plan Description of its health insurance plan, had complied with the requirements of the SPD and were entitled the additional 11 months of extended health insurance coverage they sought. The case was remanded to the district court to determine the amount of benefits that Piccadilly owed the Fallos and the amount of premiums owed by the Fallos for the extended coverage.

B. Statement of Facts Leading to this Petition

Piccadilly, then continued to argue that the premiums due by the Fallos exceeded the benefits payable by Piccadilly, seizing upon a self-serving affidavit it submitted with no evidence to support this position. This argument had continued for over two years, with Piccadilly only delaying its complete analysis of benefits versus premiums.

Finally, the parties settled the benefits and premiums issue a few days before the scheduled trial and the district judge entered a 60-day order of dismissal on March 1, 2001. The settlement amount was $31,580.76 in gross benefits, plus judicial interest, less premiums of $2,667.67 plus judicial interest. The presiding district judge referred the attorney's fees and costs issues to the magistrate judge for findings and recommendation. The Fallos filed a timely motion for

attorney's fees and costs, and the magistrate judge issued a ruling on August 16, 2001, recommending that this Court deny the Motion for Attorney's fees filed by the plaintiffs in this matter based on his analysis of the factors enumerated in Iron Workers Local #272 v. Bowen, 624 F.2d 1255, 1266 (5th Cir. 1980). The district court judge adopted the magistrate's findings and denied the Fallos' Motion for Attorney's Fees and Costs. Petitioners appealed.

On May 1, 2002, the Fifth Circuit affirmed the holding denying the petitioners claim for attorney's fees, holding that the district court's findings by applying the five-factor analysis in Iron Workers were not clearly erroneous nor represented an abuse of the trial court's discretion.

V. REASONS FOR GRANTING WRIT

When determining whether or not attorney's fees are to be awarded to a party in an ERISA action, the Fifth Circuit Court of Appeals utilizes a five-factor test without applying a presumption that a prevailing plaintiff should recover attorney's fees unless special circumstances would render such an award unjust. Such application resulted in its decision in the instant matter whereby the prevailing plaintiff was not awarded attorney's fee, which application is in conflict with the presumption applied by the Second, Eighth and Ninth Circuit Courts of Appeals.

The Fifth Circuit erred in finding that the district court did not abuse its discretion when failing to award attorney's fees to a prevailing plaintiff in an ERISA action. By affording each of the five factor's equal weight, by not considering the conflicts of the administrator-employee, and by not applying a presumption that a prevailing plaintiff should be awarded attorney's fees, the Fifth Circuit rendered a decision that is in direct conflict with the decisions of the Second, Eighth and Ninth Circuits.

The Fifth Circuit's application of the five-factors, without the presumption in favor of the prevailing party, inherently results in the denial of attorney's fees when the prevailing party settles the underlying claim for benefits. The factors concentrate on culpability of the losing party so much

so that a settling party's ability to achieve a fee award is negated.

This Court should grant writ to resolve the disparities between the application of 29 USC §1132 (g)(1) by the various circuits and announce a uniform test for the federal circuit courts of appeals to apply when determining whether or not to award attorney's fees in ERISA actions.[1]

VI. ARGUMENT

A. Law Governing Award of Attorney's Fees and Costs:

ERISA provides that: "[i]n any action under this subchapter ... by a participant, beneficiary or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 USC §1132(g)(1). See also Iron Workers Local # 272 v. Bowers, 624 F.2d 1255, 1266 (5th Cir. 1980). This award reimburses litigants for the cost of counsel, thus reducing if not eliminating one of the major obstacles to filing a lawsuit. However, unlike other fee-shifting statutes, Section 502(g)(1) does not indicate when courts should make an award, and its legislative history provides no guidance. Such an award is purely discretionary, and the district court's decision is reviewed only for abuse of discretion. Donovan v. Cunningham, 716 F.2d 1455, 1475 (5th Cir. 1983), cert. denied, 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 839 (1984).

The judiciary, therefore, created a five-factor test for providing "guidance" as to when an award of attorney's fees is appropriate. The Tenth Circuit first announced the test in Eaves v. Penn, 587 F.2d 453 (10th Cir. 1978), which test was subsequently adopted by the Fifth Circuit in Iron Workers Local # 272 v. Bowen, 624 F.2d 1255, 1266 (5th Cir. 1980). Now nearly every federal circuit has adopted this five-factor test, or a similar one, applying the test on a case-by-case basis. The district courts are to consider a "nuclei of concerns" in

---

[1]Discussions throughout this petition regarding the inappropriateness of the five-factor analysis were gleaned from discussions found throughout the law review comment, "Attorney's Fees Under ERISA: When is an Award Appropriate," by Mark Howard Berlind, 71 Cornell L. Rev. 1037 (July, 1986).

deciding whether to award attorneys' fees under ERISA which are: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting in similar circumstances; (4) whether the parties requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions. Salley v. E. I. DuPont de Nemours & Co., 966 F.2d 1011, 1017 (5th Cir. 1992); Iron Workers Local # 272 v. Bowen, 624 F.2d 1255, 1266 (5th Cir. 1980), appeal after remand, 695 F.2d 531 (5th Cir. 1983); National Companies Health Benefit Plan v. St. Joseph's Hospital of Atlanta, Inc., 929 F.2d 1558, 1575 (11th Cir. 1991). However, an explanation as to why they would use or how they developed this five-factor test was never given by the Eaves court or the Iron Workers court.

In addition to the five-factor considerations, some circuits have adopted a presumption that a prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." In attempting to develop a standard for fee shifting under ERISA, the Second, Eighth and Ninth Circuits hold that a Fees Act approach should apply to ERISA actions thereby creating the presumption. In those circuits, the five factors are formally recited as justification for an almost automatic award to every prevailing party. Several circuits, including the Fifth Circuit, have stated that a proper analysis of the five factors will, in most instances, favor an award of fees to the party which has most substantially prevailed. Gibbs v. Gibbs, 210 F.3d 491, 504 (5th Cir. 2000).

B. **Without a Presumption Favoring the Prevailing Party, Application of the Five-Factor Test in the Instant Case Shows Its Inherent Faults**

If this case had been decided by either the Second, Eighth or Ninth Circuits, the Fallos would have been awarded attorney's fees due to the presumption that a prevailing party obtains an award unless special circumstances would have

rendered such an award unjust. However, the Fifth Circuit does not utilize this presumption. Therefore, because of the inherent problems with the five-factor analysis, specifically its concentration on culpability of the losing party, a prevailing party choosing to settle his claim, like the Fallos, is less likely to be awarded attorney's fees. The fact that the losing party was reasonable in settling the matter negates against any finding of culpability or bad faith. However, if the presumption was applied, the Fallos would have prevailed as no special circumstances making an award unjust were present.

Piccadilly continuously denied the payment of benefits to the Fallos throughout this litigation. This Court held that the denial of benefits "is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire & Rubber Co. v. Burch, 489 U.S. 101, 115, 109 S.Ct. 948, 956, 103 L.Ed. 2d 80 (1989). If the plan gives the administrator or fiduciary discretionary authority, then an abuse of discretion standard is applied. Id. In this case, the Piccadilly health plan set forth the discretionary authority of the Plan Administrator.

In applying an abuse of discretion standard, an analysis must be made as to whether the plan administrator acted arbitrarily and capriciously. Penn v. Howe-Baker Engineers, Inc., 898 F.2d 1096, 1100 (5th Cir. 1990). "Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is abuse of discretion." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101,115 (1989)(citation omitted).

Piccadilly proclaimed its reasonable stance throughout the litigation citing the fact that its "good faith" interpretation of ERISA was well-founded and was agreed to and adopted by the trial judge through the granting of Piccadilly's Motion for Summary Judgment. That grant of summary judgment, however, was overturned by the Fifth Circuit. Fallo v. Piccadilly Cafeterias, Inc., 141 F.3d 580 (5th

Cir. 1998).

A careful review of the proceedings and record in this matter reveals that Piccadilly had consistently maintained a belligerent position and a steadfast refusal to pay benefits to or on behalf of the Fallos. The actions or inactions of Piccadilly throughout this litigation and its professed reasons therefore constituted arbitrary and capricious behavior tantamount to a clear abuse of discretion, especially since those behaviors were conducted by a conflicted plan administrator. The Fifth Court's approach to this kind of case is a sliding scale standard where the existence of a conflict is a factor to be considered in determining whether the administrator abused its discretion in denying a claim.

Generally courts use the five factors to decide abuse of discretion based upon the information known to the administrator at the time he made the decision. Salley v. E.I. DuPont de Nemours & Co., 966 F.2d 1011, 1015 (5th Cir. 1992). The administrator can abuse his discretion if he fails to obtain the necessary information in order to make an reasonable and informed decision regarding a claim. Id. An analysis of Piccadilly's actions and inactions clearly shows its culpability and clear abuse of discretion in its denial of the Fallos' claims.

1. *The degree of the losing party's culpability or bad faith*

Under fee-shifting principles, courts may shift fees if bad faith exists, regardless of statutory authority. This Court recognized that equity allows an award of attorney's fees "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons....' Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 1622, 44 L.Ed. 141, 154 (1975) (Citations omitted). Consideration of a defendant's bad faith is therefore unnecessary with a fee-shifting statute. The Eastern District of Wisconsin modified its application of the Eaves test to exclude any consideration of bad faith, recognizing this unnecessary and superfluous consideration. See Baeten v. Van Ess, 474 F. Supp. 1324, 1332 (E.D. Wis. 1979). See also, Landro v. Glendenning Motorways, Inc., 625 F. 2d 1344, 1356

(8th Cir. 1980) (noting that courts have discretion at common law to award attorney's fees against losing parties who have acted in bad faith and that there is presumption against interpreting statute so as to render it superfluous); Bugher v. Consolidated X-Ray Ser. Corp., 705 F. 2d 1426, 1436 (5th Cir. 1983)(Assessing fees against a party who had acted in bad faith when award was not justifiable under §502(g)(1)), cert. den. 105 S.Ct. 3524 (1985).

This factor is improper because by considering the degree of a party's culpability, the court uses a fee shifting provision as a punitive measure. Further, the fifth factor requiring a consideration of the relative merits of a party's position, also requires an inquiry as to culpability.

Any inquiry into culpability is improper because, as in this case, it suggests and results in the court denying a fee to an otherwise worthy party because the losing party was not culpable. It also negates against conserving judicial resources and settling underlying claims because the reasonableness of the settlement can be and is viewed as nonculpable behavior, thereby preventing a settling party from a fee award. In the instant case, however, although Piccadilly settled the Fallos' underlying claim, its actions throughout the litigation represent culpable behavior. The trial court erred in not considering those actions in light of the fact that the claims administrator was an employee of Piccadilly and thereby conflicted.

Throughout the course of the litigation, Piccadilly's alleged rationale for denial of benefits has changed, with Piccadilly seizing upon the opportunity to assert what appears to be a new legitimate explanation when each previous explanation it offers fails with the courts. Piccadilly has utilized any and every opportunity and any reason it could conjure to avoid paying benefits under the requested extended coverage.

When first notified of Kasey Fallo's disability, Piccadilly conditionally responded that there would be no extension of benefits unless there is a social security finding of disability within 60 days of the expiration of the initial coverage on August 25, 1993: "Mrs. Fallo has sixty (60) days from the date of the discontinuation of coverage to establish

that she is disabled for purposes of social security and therefore entitled to COBRA benefits." Then, Piccadilly changed its mind, returned the Fallos' premium, and unconditionally denied extended coverage. Piccadilly then proceeded to vigorously oppose the Fallos' attempts to obtain coverage throughout this litigation.

As its initial defense, Piccadilly argued that the Fallos were not entitled to extended coverage because at that time a disability determination had not yet been obtained by Kasey Fallo from the Social Security Administration. Piccadilly even obtained a stay of proceedings on the precedent that the determination of the Social Security Administration would be dispositive of the issue: "[I]f Ms. Fallo was in fact disabled, and if the disability is determined to have begun during the eighteen months of COBRA coverage, then she would be entitled to additional coverage." The Fallos relied upon this assertion, foolishly believing that a disability determination by the Social Security Administration would be their last step before obtaining benefits.

When the Social Security Administration ruled in the Fallos' favor regarding Kasey Fallo's disability, Piccadilly still denied extended benefits, contradicting their former representations to this Court and the Fallos that a decision by the Social Security Administration would settle the matter. Piccadilly now began arguing that the failure of the Fallos to obtain the SSA disability determination within 18 months of the qualifying event, i.e. Scott Fallo's termination of employment, was its legitimate reason for denial of benefits. According to Piccadilly, Scott Fallo's employment was terminated in February 1992, and, according to its Plan, a disability determination would have been required by August 25, 1993. Piccadilly pointed out that the Fallos did not even institute this legal action until February of 1994, after which a disability determination was finally obtained.

If Piccadilly had been genuine in their coverage interpretation and had indeed exhibited "good faith,", it would have initially denied the extension for all of the above reasons, i.e., the fact that no disability determination was obtained whatsoever within the requisite time period. This would have forced this Court to rule on the timeliness issue

before the disability determination was obtained, instead of waiting over 18 months only to have Piccadilly deny benefits again, regardless of the results of the Social Security Administration proceedings. However, Piccadilly has engaged in a steadfast denial of coverage for one reason or the other, jumping from reason to reason when one explanation does not suffice as a legitimate basis for denial of benefits. Apparently, Piccadilly expected the Social Security Administration to rule that Kasey Fallo was not disabled which is why they wanted to say the instant proceedings.

Piccadilly even went so far as to claim that even if coverage should have been extended, the amount of premiums due Piccadilly actually exceeded the amount that Piccadilly should be required to pay in claims. In other words, Piccadilly took it upon itself to analyze the claims as submitted by the Fallos, and still denied benefits.

A review of the record shows that Piccadilly was provided with detailed billing as to the amounts of the claims and the reference codes attributed to those treatments. The denial in the affidavit was broad and unexplained as to the cause. Piccadilly took no steps to further investigate the claims by either requesting more complete submissions from the health care providers or the insured, more complete billing from the providers or the insured, complete hospital records, etc. Piccadilly was apparently so convinced of its eventual success in this litigation, that it ignored the submitted claims until the probability arose that the insurance coverage may indeed be extended beyond the initial 18-month period, resulting in the execution of the conflicted claims administrator's self-serving affidavit arguing that premiums exceeded benefits. It was only at that point in time that Piccadilly began claiming incomplete submissions.

Under ordinary administrative practices, the administrator would properly investigate the claims, the charges, and the prognoses of doctors to determine if coverage under the health plan would apply and benefits awarded. Plaintiffs forwarded invoices to defendant as far back as August 31, 1994, the date of their initial responses to Piccadilly's Interrogatories and Requests for Production, which identified all care givers and the amounts of benefits

claimed under the policy. Apparently, the charges were summarily dismissed based upon Piccadilly's position that the Fallos' coverage had terminated.

In fact, even after the Fifth Circuit ruling in the Fallos' favor, Piccadilly continued to insist that the Fallos owed Piccadilly money in excess of the benefits owed by Piccadilly. At one point, Piccadilly even tried to flex its proverbial financial muscle by stating that "(Piccadilly) is willing to accept a dismissal of this action rather than pursue the amount of premiums owed."

Since no explanation of benefits was provided along with the affidavit, the Fallos inquired as to manner and method in which the dollar amounts contained in the plan administrator's analysis were reached. Piccadilly, however, needed time to determine how the analysis was reached, an analysis which Piccadilly then based its main defense – the same analysis included in an affidavit that was filed in the record before this Court as being true and correct. How could Piccadilly have sworn to the "truth" of the information contained therein and not know or have some written documentation showing the method and manner in which it reached the conclusions therein? This delay in providing information that should have been readily available only begins to show the frivolous nature in which Piccadilly has handled the Fallos' claims.

Piccadilly did not even abide by the terms of its own health plan which stated, in part, that:

> Any decision by the Plan Administrator shall be furnished to the Covered Person in writing and in a manner calculated to be understood by the Covered Person and shall set forth the specific reason(s) for the decision and the specific Plan provision(s) on which the decision is based.

The Fallos had never been provided with a proper explanation of benefits prior to January of 2001, but only provided with definitive, self-serving statements from Piccadilly regarding the premiums and benefits due. This is

hardly an acceptable, reasonable and "good faith" effort to resolve the matter, especially considering that the amounts originally sworn to by Piccadilly in its affidavit of May 5, 1997, continuously changed throughout the litigation. Whenever plaintiffs provided Piccadilly with further information, which Piccadilly itself could have obtained and should have obtained, and the claims administrator finds time to review the claims as she was originally required to do, the figures change in the Fallos' favor. In fact, the figures changed so drastically that they went from the Fallos owing Piccadilly money to Piccadilly settling the claim for over $45,000.

The Fallos had responded to extensive discovery propounded by Piccadilly, executed every medical authorization, Social Security Administration release and every other document requested by Piccadilly. A review of the record and the parties' submissions shows that Piccadilly was at least on notice as to the amounts of the claims, although Piccadilly took no steps to further investigate the claims by either requesting more complete submissions from the health care providers or the insured, more complete billing from the providers or the insured, complete hospital records, etc. Further, the initial submissions made by the Fallos, in the most part, contained proper coding, and should have resulted in the approval of over $30,000.00 in benefits.

At the very least, administrators relying on hospital records when determining whether a claim should be allowed under the plan obviously must review the most recent records. Salley v. E.I. DuPont de Nemours & Co., 966 F.2d 1011, 1016 (5th Cir. 1992). There is no justifiable basis for placing the burden solely on the administrator to generate evidence relevant to deciding the claim, which evidence may or may not be available to it. Vega v. National Life Insurance Services, 188 F.3d 287, 298 (5th Cir. 1999). The trial court held that Piccadilly was faced with incomplete information when making its denials. Plaintiffs provided the needed information, which delay is as much attributable to the Fallos as to Piccadilly. However, this decision by the trial court is tantamount to declining to hold an administrator to his duties and placing the burden solely on the claimant. Piccadilly went so far, at one point in the litigation, to state that "[t]his

ongoing intransigence and failure to comply with the terms of the statute and plan on the part of the plaintiffs is the reason why they have incurred fees and costs." The opposite is true, in this case. It is Piccadilly's ongoing intransigence and failure to comply with the terms of its own plan that have resulted in the lengthiness of this litigation as well as the largely avoidable incurrence of fees and costs.

The onus is not upon the claimant to provide proper and thorough documentation for an administrator to make a reasonable decision regarding a claim. Salley v. E. I. DuPont de Nemours & Co., 966 F.2d 1011, 1016 (5th Cir. 1992). The administrator's job is to ensure the claim is properly evaluated and not have to rely solely upon documentation provided by the claimant, as Piccadilly was doing before attempting to properly evaluate the claims. Although it is inappropriate and inefficient to require the administrator to obtain information in the absence of the claimant's active cooperation, such was not the case here.

A court must give deference to the administrator's decision. That the administrator decides a claim when conflicted, however, is a relevant factor. In a situation where the administrator is conflicted, the court should give less deference to the administrator's decision. In such cases, the court should be less likely to make forgiving inferences when confronted with a record that arguably does not support the administrator's decision. Although the administrator has no duty to contemplate arguments that could be made by the claimant, the administrator's decision must be based on evidence, even if disputable, that clearly supports the basis for its denial. Vega, 188 F.3d at 299. The district court did not consider possible bias of a conflicted administrator when denying these claims.

A district court, in most instances, is limited to the administrative record when it reviews an administrator's determination. As a result, the district court must inquire only whether the "record adequately supports the administrator's position"; from that inquiry it can conclude that the administrator abused its discretion if the administrator denied the claim without some concrete evidence in the administrative record. Gooden v. Provident

Life & Accident Insurance Co., 250 F.3d 329, 333 (5th Cir. 2001). Throughout its opinion, the district court continuously gave forgiving inferences to the blanket denials and the miscalculated premiums, ultimately holding Piccadilly's position throughout the many years of litigation as reasonable.

Piccadilly obviously failed to take any action or undertake any efforts to properly and timely review the claims submitted prior to the 5th Circuit ruling, as evidenced by its changing figures regarding both benefits and premiums due. At the very least, however, Piccadilly's actions since the 5th Circuit decision ruling that the Fallos were entitled to an additional 11 months of coverage border on "frivolous." Piccadilly's actions serve only one of three purposes: (1) to further delay the resolution of this matter; (2) to cause the incurrence of additional time and costs by plaintiffs' attorneys; or (3) operate to change the amounts due in premiums and benefits previously sworn to by Piccadilly.

Apparently, Piccadilly still had not thoroughly reviewed the claims because it could never itemize the amounts of the charges that are covered but merely indicated whether charges were eligible for coverage. In fact, plaintiffs can cite to at least six different documented premium calculations by Piccadilly throughout this litigation, which premium amounts were totally in Piccadilly's purview and control and never reliant upon any information obtained from a claimant:

5/5/97 affidavit of Jeanita K. Slaton:
Premiums due $5,598.68. Concluded that Fallos owed Piccadilly.

1/7/00 letter from Piccadilly:
Premiums due $4,688.00. Concluded that Fallos owed Piccadilly.

Handwritten analysis of Jeanita Slaton (date unknown): Premiums due $1,591.64.

Handwritten analysis of Jeanita Slaton (date unknown): Premiums due $4,007.04

8/21/00 letter from Piccadilly:
Premiums due $7,032.19. Concluded that Fallos owed

Piccadilly.

2/19/01 letter from Piccadilly:

Premiums due $6,894.72. Concluded that Piccadilly owed Fallos over $45,000.

However, not only has Piccadilly unreasonably delayed settlement of this matter, it has delayed litigation of this matter, in essence, delaying any of the Fallos hopes of resolution of this matter. For example, when given the opportunity to expedite this matter and have the case heard before a magistrate judge, Piccadilly refused, stating its reason for refusal being the trial judge's intimate familiarity with the matter. Ironically, the issues which remained unresolved did not require "intimate" knowledge of the case in that only extent of coverage and amount of premiums due need be decided. The only intimate knowledge needed was a logical interpretation of the claim covered by the Plan. These issues have never been presented nor briefed before any court, and petitioners respectfully submit that this was only a further delay tactic displayed by Piccadilly, a further abuse of discretion.

Although a two-year delay in the payment of benefits which were legally due resulted, the district court failed to see Piccadilly's bad faith, determined the initial denials to be reasonable as the legal issues were "close calls," and held that the delay was not unreasonable. Application of this factor involving the degree of culpability would deter other plaintiffs from bringing suits in close cases, thereby discouraging potentially meritorious actions.

2. *The ability of the losing party to satisfy an award of attorney's fees:*

This is perhaps the only factor that considers special circumstances that may exist which would make an award of attorney's fees unjust. This is also the only factor that applies fee-shifting principles to this fee-shifting provision. Interestingly, this factor also weighed in the Fallos' favor when the district court conducted its five-factor analysis.

3. Whether an award of attorney's fees against the losing party would deter others acting under similar circumstances:

Again, fee shifting becomes punitive with the application of this factor in that it is being employed to deter conduct. ERISA allows for compensatory damage awards apart from fee shifting under section 502(g)(1). Compensatory damages, along with the necessity of bearing one's own costs if a suit is brought, deter conduct violative of ERISA without being punitive. In fact, Piccadilly alleged that the litigation has already served a deterrent purpose, i.e., Piccadilly has changed its SPD to read more similarly to the Plan. However, that should not be a factor weighing against attorney's fees in this matter.

Additionally, the statute's punitive provisions and its strict fiduciary standard also deter such conduct. Because deterrence exists absent section 502(g)(1), using that section as a further deterrent only adds extra penalty for improper conduct. Neither punitive nor deterrent fee shifting is justified absent bad faith, and Congress did not intend that section 502(g)(1) be applied punitively.

An award of attorney's fees would deter other ERISA-plan sponsors from delaying proper payment of benefits. Again, at the very least, Piccadilly has been on notice that benefits are due to the Fallos since the May 29, 1998 judgment of the United States Fifth Circuit. At that time, Piccadilly already had voluminous medical records and properly coded billing statements. That judgment was rendered almost three years prior to settlement of the underlying claim for benefits in this matter.

If Piccadilly does not have to pay attorney's fees, it would only be liable for what it should have covered before this litigation commenced. With nothing to lose but its own litigation costs, other ERISA-plan sponsors might find it worthwhile to force underfinanced beneficiaries to sue them to gain their benefits or accept undervalued settlements. See National Companies Health Benefit Plan v. St. Joseph's Hospital of Atlanta, Inc. 929 F.2d 1558 (11th Cir. 1991). "An award of attorney's fees will serve as a deterrent and will encourage plan administrators not to shirk their

responsibilities in the claims review process." Roig v. Limited Long Term Disability Program, 2000 WL 1176522 (E.D. La. August 4, 2000).

***4. Whether the party requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA plan or resolve a significant question regarding ERISA, itself*:**

This factor practically negates awarding attorney's fees to an individual who did not file a class action or declaratory judgment action. In fact, the district court's opinion cites the possibility of these two types of lawsuits as evidence that the Fallos did not seek to benefit all participants in Piccadilly's plan. Although they did not file a suit in the format that would have apparently weighed this factor in their favor, the Fallos' action did benefit all plan participants.

The Fallos detrimentally relied upon the Piccadilly-supplied language of the SPD when notifying Piccadilly of Kasey Fallo's disability which rendered her "unable to engage in virtually any occupation." It is also noteworthy that there is no definition of "disabled" or "disability" contained within the SPD.

The Fallos' detrimental reliance on the vague and ambiguous SPD is further demonstrated by the fact that they remitted premiums to Piccadilly after the initial eighteen (18) month period and during what should have been the eleven (11) month extended period. Piccadilly did not return the premium check until September 27, 1993. Piccadilly's retention of the insurance premium for nearly one month naturally led the Fallos to believe that coverage was extended in accordance with the SPD.

This litigation has benefitted all participants of the Piccadilly plan and resolved a significant legal question regarding the determination of disability and the extension of benefits as a result thereof. Piccadilly has already rewritten its SPD in a more clear and straightforward manner, so that all plan participants are able to fully understand their rights under the Plan.

Even if the Fallos had filed a class action suit or a declaratory judgment action, the automatic award of attorney's fees in such cases is inherently unfair. Consideration of the amount of benefit conferred on members of the pension plan as a whole resembles the common fund or common benefit doctrine. At equity, court may assess fees to a class that benefits from the litigation. Thus, if a common benefit results from an ERISA suit, courts can shift the cost of attorney's fees from the plaintiff to the benefitted class independent of ERISA's fee-shifting provision. Applying the common benefit doctrine reflects the statute's purpose and enables qualifying potential plaintiffs, regardless of their financial status, to bring ERISA actions. The five-factor test, however, treats the creation of a common benefit as an opportunity to shift fees to the defendant, resulting in unjust enrichment to the benefitted class. The common benefit rationale offers no justification for shifting a plaintiff's attorney's fees to a defendant.

5. The relative merits of the parties' positions:

Largely discussed under the bad faith/culpability factor discussion above, this factor also requires an inquiry into culpability which is totally improper under fee-shifting principles. Curiously, the trial court found the culpability factor to weigh in Piccadilly's favor, yet found that the relative merits of the Fallos' positions weighed in favor of an award.

VII. CONCLUSION

By not considering a presumption favoring an award of attorney's fees to a prevailing party, the Fifth Circuit's five-factor analysis has created a situation where a prevailing party, who settled the underlying claim, is prevented from recovering attorney's fees due to the inherent faults in that five-factor analysis. By concentrating on culpability more than fee-shifting principles, the five-factor test utilized alone, will result in a chilling effect to litigants whose claims may be close. It also discourages settlement practice, thereby

requiring an exhaustion of judicial resources in order to recover fees.

The purpose of this fee-shifting statute is to facilitate meritorious ERISA litigation that plaintiffs would not otherwise bring because of the cost of retaining an attorney. Courts should award attorney's fees to those plaintiffs who could not bring their action but for knowledge that if they won on the merits courts would award them fees. The court should compare the damage award to the amount of attorney's fees charged to the plaintiff. Courts should always grant a plaintiff's request for attorney's fees if the fee is equal to or greater than the damage award. The court should grant a party's request in close cases when it is difficult for the plaintiff to determine whether or not his damages would exceed his attorney's fees. This will prevent the five-factor test adopted by the Fifth Circuit from having a chilling effect on potential plaintiffs whose expected costs are close to their expected recovery. Courts should err on the side of allowing more ERISA plaintiffs to bring suit for fear that a meritorious claim would go unasserted if the case is close.

The inherent faulty analysis employed by the Fifth Circuit, utilizing five-factors that concentrate more on punitive principals and less on fee-shifting principles as well as its failure to apply a presumption in favor of awarding fees to a prevailing party, as employed by the Second, Eighth and Ninth Circuits, results in a chilling effect upon settlement of ERISA claims as well as the assertion of potentially meritorious claims when a close question is involved. This Court should resolve the disparities between the application of 29 USC §1132 (g)(1) by the various circuits and announce a uniform test for the federal circuit courts of appeals to apply when determining whether or not to award attorney's fees in ERISA actions.

THEREFORE, Petitioners, Scott Fallo and Kasey Fallo request of this Court that is GRANT their Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

DWYER & CAMBRE
Stephen I. Dwyer
Counsel of Record
Susanne Cambre
Michelle Mayne Davis
1524 W. Causeway Approach
Mandeville, LA 70471
Telephone: (985) 624-3307
Attorneys for Petitioners

(Any footnotes trail the end of each document.)
No. 01-31283

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SCOTT FALLO; KASEY FALLO
Plaintiffs-Appellants,

v.

PICCADILLY CAFETERIAS, INC.; ET AL.,
Defendants,

PICCADILLY CAFETERIAS, INC.,
Defendants-Appellee.

May 1, 2002 filed

Appeal from the United States District Court
for the Eastern District of Louisiana
(94-CV-907-M)

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges. PER CURIAM:*

Plaintiffs-Appellants Scott and Kasey Fallo appeal the district court's order denying their motion for attorney's fees and costs incurred in the instant Employment Retirement Income Security Act (ERISA) suit. The Fallos argue that the district court abused its discretion in denying the motion.

The district court, by adopting the magistrate judge's report and recommendation, determined that an award was unwarranted because, although Piccadilly had the ability to satisfy such an award, there was no indication that Piccadilly had acted in bad faith, that an award in the instant case would have a deterrent effect, and that the instant suit would benefit all participants of an ERISA plan or would resolve a significant ERISA question. The district court also reasoned

that Piccadilly's legal position was not so disproportionately meritless as to justify an award. After reviewing the record and the briefs of the parties, we cannot say that these findings are clearly erroneous or that they represent an abuse of discretion. Ramsey v. Colonial Life Ins. Co. of America,, 12 F.3d 472, 480 (5th Cir. 1994). Accordingly, the district court's order denying the Fallos' motion for attorney's fees and costs is AFFIRMED. id., Harms v. Cavenham Forest Industries, Inc., 984 F.2d 686, 694 (5th Cir. 1993)

AFFIRMED.

Footnotes

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 94-907

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SCOTT FALLO; KASEY FALLO
Plaintiffs-Appellants,

v.

PICCADILLY CAFETERIAS, INC.; ET AL.,
Defendants,

PICCADILLY CAFETERIAS, INC.,
Defendants-Appellee.

August 16, 2001 filed

FINDINGS AND RECOMMENDATION

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, Scott Fallo and his wife, Kasey Fallo, filed this action in state court against Mr. Fallo's former employer, Piccadilly Cafeterias, Inc. ("Piccadilly"). They claimed entitlement to extended health insurance benefits from Piccadilly under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") and sought damages under the Americans with Disabilities Act. Piccadilly removed the case to this court on March 17, 1994 pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. § 1001 et seq.

> Following the termination of Scott Fallo's employment with Piccadilly Cafeterias, Scott and Kasey Fallo attempted to extend their health insurance coverage under the provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) and Piccadilly's Health Benefits Plan (the

> Plan) because of Kasey Fallo's disability. The district court denied the Fallos['] motion for summary judgment and granted Piccadilly's cross-motion for summary judgment, finding that the Fallos did not meet the requirements for this extended health insurance coverage. . .
>
> Scott Fallo ended his employment with Piccadilly in February 1992. Before leaving, he expressed his intention to extend health benefits under COBRA for an additional 18 months. During this period of continuation coverage, the Fallos paid their required premiums. In January 1993, Fallo's wife, Kasey, became pregnant. Kasey Fallo is a diabetic and her pregnancy was marked by serious complications. The 18 month period of continuation coverage was scheduled to end on August 25, 1993. On August 23, 1993, Scott Fallo's father, by certified mail, sent Piccadilly notice that Kasey Fallo was "disabled" by her pregnancy and that she relied upon her disability to extend further their health insurance benefits under COBRA. - . On September 8, 1993, Piccadilly responded that it would not extend coverage unless Kasey Fallo obtained a determination "that she is disabled for purposes of Social Security" within 60 days of August 25, the date that the initial extension of coverage ended. Piccadilly eventually denied coverage and this litigation ensued.
>
> While this suit was pending, Kasey Fallo applied to the Social Security Administration for a determination that she was disabled.

Fallo v. Piccadilly Cafeterias, Inc., 141 F.3d 580, 581-82 (5th Cir. 1998) (footnotes omitted).

The presiding district judge dismissed plaintiffs'

Americans with Disabilities Act claim on defendant's first motion for summary judgment on July 7, 1994. Record Doc. No. 16. On July 7, 1994 and March 17, 1995, the court denied Piccadilly's first and second motions for summary judgment, respectively, on the merits of plaintiffs' ERISA claim. Record Doc. Nos. 16, 27.

Because Mrs. Fallo's entitlement, if any, to extended health insurance coverage indisputably depended on a finding that she "is disabled for purposes of Social Security," this lawsuit was stayed on June 19, 1995 upon defendant's motion while the Social Security Administration considered Mrs. Fallo's application for disability benefits, which had been filed in April 1994. Record Doc. No. 32. The Social Security Administration denied Mrs. Fallo's application for disability benefits initially and on reconsideration. Defendant's Exh. S. She appealed and the Social Security Administration determined on November 27, 1996 that she had been disabled between March 1993 and October 1994. Defendant's Exh. W.

After that decision became final, this case was reopened on plaintiffs' motion on April 11, 1997. Record Doc. No. 37. Piccadilly continued to deny that plaintiffs were entitled to extended health insurance coverage. On July 29, 1997, the district judge denied plaintiffs' motion for summary judgment, granted Piccadilly's cross-motion for summary judgment and entered judgment for defendant. Record Doc. Nos. 43, 44.

The Fallos appealed to the Fifth Circuit, which reversed the grant of summary judgment and rendered judgment in favor of plaintiffs on the coverage issue on May 29, 1998. Record Doc. No. 46. The appeals court held that plaintiffs were entitled to rely on Piccadilly's Summary Plan Description of its health insurance plan, had complied with the requirements of the Summary Plan Description and were entitled to the 11 months of extended health insurance coverage they had requested. The Fifth Circuit remanded the case to this court to determine the amount of benefits that

Piccadilly owed to the Fallos and the amount of premiums that the Fallos owed to Piccadilly for the extended coverage.

The parties settled the benefits and premiums issues a few days before the scheduled trial and the district judge entered a 60-day order of dismissal on March 1, 2001. Record Doc. No. 55. Plaintiffs demanded attorney's fees and costs under ERISA but Piccadilly did not agree that they were entitled to any fees and costs. The presiding district judge referred the attorney's fees and costs issues to me for findings and recommendation. Record Doc. No. 56.

The Fallos filed a timely motion for attorney's fees and costs, supported by voluminous exhibits. Record Doc. No. 61. Defendant filed a timely opposition memorandum with equally voluminous exhibits. . Record Doc. No. 63. In its memorandum, Piccadilly requested that it be given the opportunity to submit evidence at a later date, if necessary, concerning its ability to pay an award of attorney's fees.

Accordingly, the court ordered Piccadilly to submit such evidence, Record Doc. No. 64, and Piccadilly did so, Record Doc. No. 66. Having reviewed the record, the submissions of the parties and the applicable law, and for the following reasons, IT IS RECOMMENDED that plaintiffs' motion be DENIED.

II. ANALYSIS

A. Standard for Awarding Attorney's Fees and Costs Under ERISA

It is well established that "a party need not prevail in order to be eligible for an award of attorneys' fees under § 1132(g)(1) of ERISA." Gibbs v. Gibbs 210 F.3d 491, 503 (5th Cir. 2000). "[T]he prevailing status of the parties is not determinative of the fee awards, though generally, a proper analysis of the five factors will in most instances favor an award of fees to the party which has most substantially prevailed." Id. at 504.

The determination of attorney's fees and costs in an ERISA case requires a two-step analysis. First, the court must determine whether the party is entitled to fees by applying the following analysis.

> Under ERISA, "the court in its discretion may allow a reasonable attorneys' fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). Such an award, as the statute states, is purely discretionary. ... The [Fifth Circuit] has generally required, however, that the following five factors [known as "the Bowen factors"] be considered in deciding whether to award attorneys' fees to a party under § 1132(g)(1):
>
> [A] court should consider such factors as the following: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing party would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' position.
>
> While other circuits have asserted that a presumption exists under ERISA in favor of awarding costs and attorneys' fees, that is not the law in ... this Circuit.

Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1458-59 (5th Cir. 1995). (citing Harms v. Cavenham Forest Indus. Inc., 984 F.2d 686, 694 (5th Cir. 1993); Salley v. E.I. DuPont de Nemours & Co., 966 F.2d 1011, 1016 (5th Cir. 1992); Iron Workers Local No. 272 v. Bowen 624 F.2d 1255, 1266 (5th Cir. 1980)). "No one of these factors is necessarily decisive, and some may not

be apropos in a given case, but together they are the nuclei of concerns that a court should address in applying section 502(g)." Bowen, 624 F.2d at 1266.

Second, if the court determines that a party is entitled to an award of attorney's fees, the court must apply the "lodestar" method to calculate the reasonable amount to be awarded. Todd, 47 F.3d at 1459.

Analysis of the five factors in the instant case presents a painfully close question. On balance, however, I find that the factors weigh in favor of Piccadilly and that plaintiffs' motion for attorney's fees should be denied for the following reasons.

B. Piccadilly Did Not Act in Bad Faith

Plaintiffs argue that Piccadilly acted in bad faith from the date that it first denied coverage and continuing throughout this litigation. As evidence of the alleged bad faith, plaintiffs contend that Piccadilly consistently denied coverage until after the Fifth Circuit ruled and that its rationale for denial of coverage kept changing: Piccadilly's calculations of premiums owed and benefits due also kept changing: Piccadilly had a duty, which it neglected, to gather the medical records and invoices that proved the amount of plaintiffs' claim; and, had Piccadilly gathered the medical records, it would have known that the Social Security Administration would "inevitably" find Mrs. Fallo disabled.

Based upon a thorough review of the arguments and evidence submitted, I find that plaintiffs' allegations of bad faith are unfounded. First, Piccadilly consistently and continually refused the Fallos extended coverage based on the language of the Plan, and the presiding district judge granted summary judgment to Piccadilly based on that language. The Fifth Circuit confirmed that the Plan contained the language on which Piccadilly relied. Fallo, 141 F.3d at 583 ("Both the Plan and COBRA contemplate that the qualified beneficiary will provide notice of the Social Security

disability finding before the expiration of the initial 18 month period of extended benefits,"). Neither the Fifth Circuit nor the presiding district judge made any finding that Piccadilly acted in bad faith by relying on the terms of the Plan to deny coverage.

However, the Fifth Circuit found that Piccadilly's Summary Plan Description conflicted with the language of the Plan itself.

> Unlike the language of the Plan and COBRA, this provision does not state that the qualified beneficiary must send notice of a Social Security Administration disability finding before the end of the initial 18 month extension, nor does the SPD [Summary Plan Description] state that the disability must exist at the time of the qualifying event such as the termination of employment. In a case of conflict such as this, where the requirements of the SPD are more lenient than those contained in the Plan, the SPD is controlling.

Id. at 584. Thus, until the Fifth Circuit ruled, Piccadilly had been consistent, and successful in the district court, in its refusal to extend coverage. While the Fifth Circuit ultimately found Piccadilly's legal position to be incorrect, that does not equate to a finding of bad faith.

The evidence submitted by the parties negates plaintiffs' assertion that Piccadilly's rationale for denying coverage "kept changing." By letter dated September 8, 1993, Piccadilly explained that it denied coverage, inter alia, because Mrs. Fallo establish that she is 'disabled' under the definitions of the Social Security Act" and she "has 60 days from the date of expiration of coverage to establish that she is disabled for purposes of Social Security." Plaintiffs' Exh. A at p.2. On September 27, 1993, Piccadilly returned plaintiffs' check for the premium for extended coverage, for the reasons explained in the September 8, 1993 letter. Plaintiffs'

Exh. B.

In its original motion for summary judgment filed on April 4, 1994, defendant argued that it could not be liable under the terms of its plan because of plaintiffs' failure to notify it of any disability within the 18-month period of extended coverage, or to notify it of any determination of disability by the Social Security Administration. Defendant's Exh. A, at pp. 10-11. In its reurged motion for summary judgment on January 10, 1995, Piccadilly again argued that Mrs. Fallo was required to provide it with notice of a determination of Social Security disability prior to the expiration of the 18-mouth period of extended coverage and that she still bad not provided such notice. Defendant's Exh. O, at p.6. Thus, contrary to plaintiffs' contention, defendant did not raise this argument for the first time after plaintiffs obtained a Social Security disability determination.

This case is completely unlike Wegner v. Standard Ins. Co., 129 F.3d 814(5th Cir. 1997), which plaintiffs cite in support of their argument that Piccadilly acted in bad faith. In Wegner, the district court found that defendant's "attempt to support its [disability] benefit calculation via a [salary] Change Authorization form that was executed after Wegner became disabled 'bordered on the frivolous, " and the Fifth Circuit held that defendant's contentions "evidence[] a lack of credibility on Standard's part, and convince[ ] us that the above argument is nothing but a post hoc attempt to justify what was an otherwise proscribed use of the Change Authorization form," thus justifying the district court's weighing of such behavior against defendant. Id. at 821. Standard's conduct in Wegner was bad faith because it was not based on any reasonable use of the evidence, while Piccadilly's conduct was based on a reasonable, although ultimately unsuccessful, interpretation of the Plan.

Piccadilly's motion for a stay in mid-1995 pending the outcome of a Social Security disability determination does not evidence bad faith. Both the Plan and the Summary Plan Description required Mrs. Fallo to obtain such a

determination before coverage could be extended. A denial of Social Security disability benefits would clearly terminate this lawsuit in Piccadilly's favor. "Because the Social Security Administration's decision could be dispositive of the outcome of this suit, the district court granted the stay." Fallo, 141 F.3d at 582. Therefore, the stay served judicial economy and the convenience of the parties. It is unpersuasive of plaintiffs to suggest, as evidence of Piccadilly's bad faith, that Piccadilly "should have known or at least been on notice of the inevitable conclusion" that the Social Security Administration would find Mrs. Fallo disabled, Memorandum in Support of Motion for Attorney's Fees and Costs, Record Doc. No. 61 at p.7, when the Social Security Administration denied her application both initially and upon reconsideration, and only found her disabled after a hearing before an administrative law judge. Defendant's Exh. S, Mar. 24, 1995 Social Security Administration decision denying benefits; Defendant's Exh. W, Nov. 27, 1996 Social Security Administration decision finding disability.

Finally, Piccadilly's neglect of its alleged duty to gather medical records and invoices to support plaintiffs' claims does not evidence bad faith either factually or legally. First, so long as Piccadilly denied that Mrs. Fallo was covered at all, it had no reason to collect medical records and to calculate benefits that it denied were due. That would have been a futile exercise.

Second, the Fifth Circuit has squarely held that an administrator "is not under a duty to 'reasonably investigate' a claim because it would be 'not only inappropriate but inefficient to require the administrator to obtain [] information [in the claimants control] in the absence of the claimant's active cooperation.'" Gooden v. Provident Life & Accident Ins. Co., 250 F.3d 329,333(5th Cir. 2001) (quoting Vega V. National Life Ins. Servs., Inc., 188 F.3d 287,298(5th Cir. 1999) (en banc)) (emphasis added); accord Roig v. Limited Long Term Disability Program, No. 99-2460, 2000 WL 1146522, at *14 (E.D. La. Aug. 4, 2000) (Vance, J.).

The Fallos cite Salley v. E.I. DuPont de Nemours & Co., 966 F.2d 1011, 1015(5th Cir. 1992). for the proposition that a plan administrator has a duty to investigate and gather medical records. The en banc Fifth Circuit in Vega specifically held that Salley did not impose any such general duty. Vega 188 F.3d at 298. Rather, it is the claimant's duty in the first instance to supply the administrator with evidence to substantiate her claims because the evidence is more readily accessible to the claimant and such a rule encourages claimants to provide all relevant evidence to the administrator in order to resolve disputes at that level. Id. at 298, 300; accord Gooden 250 F.3d at 334 n.7, 335.

After the Fifth Circuit ruled that plaintiffs were entitled to coverage, Piccadilly cooperated with plaintiffs in reviewing the medical evidence to determine the amount of plaintiffs' valid claims under the Plan. This process was lengthy, as plaintiffs gathered and submitted to Piccadilly medical records and invoices that were then more than five years old, some of which had to be reconstructed by the health care providers. It was during this time period that Piccadilly's calculation of the amounts due to plaintiffs "kept changing," as plaintiffs allege. Changes occurred as plaintiffs submitted previously unaccounted-for records, and the administrator reviewed them for eligibility and took them into account in its calculations. Piccadilly also admittedly corrected prior errors in calculations. The delays in reaching final figures were attributable at least as much to plaintiffs as to defendant.

The Fallos point to the changes in calculated benefits due since May 5, 1997, when Piccadilly submitted with one of its motions for summary judgment an affidavit by Jeanita K. Slaton, Piccadilly's employee benefits administrator. The affidavit asserted that, if Piccadilly were required to extend the requested coverage, the amount of premiums due from the Fallos as of that date for the 11-mouth extension would be approximately $5,500, which would exceed the amount of benefits due to plaintiffs by approximately $2,700, based on the medical claims that had so far been submitted. As noted

above, complete medical evidence and invoices were not submitted by plaintiffs until long after the Fifth Circuit ruled in 1998; the correspondence between the parties indicates that final figures were not reached until February 2001. Thus, the 1997 calculation does not evidence bad faith by Piccadilly.

The Fallos also point to Piccadilly's changing calculations of the amount of premiums owed by the Fallos to Piccadilly. Again, these changes do not demonstrate bad faith, but only reflect changes based on additional information received over the course of this litigation, simple errors in calculation and defendant's offer to reduce the premiums during settlement negotiations. Defendant's Exhs. VV, YY, ZZ.

The absence of bad faith by Piccadilly weighs in favor of denying plaintiffs request for attorney's fees and costs.

C. Piccadilly's Ability to Satisfy an Award of Attorneys' Fees

Neither party initially submitted any evidence of defendant's ability to pay an award of attorney's fees, although Piccadilly requested that it be given the opportunity to submit evidence at a later date, if necessary. After the court ordered Piccadilly to file such evidence, it submitted the affidavit of W. Scott Bozzell, who is its Executive Vice President, Secretary and Controller. Record Doc. No. 66.

Bozzell avers that Piccadilly has experienced declining sales for the past three years and, more importantly, has suffered a decline in net income from $7.9 million in the year ended June 30, 1999 to a net loss of $27.9 million for the 12 months ended March 31, 2001. In May 2001, Piccadilly announced that it was in default of its Senior Credit Facility. However, it reached an agreement with its lenders in June that waived the default. Piccadilly's cash balances have decreased from $4.4 million on March 31, 2001 to approximately $2 million on June 30, 2001. Id.

Plaintiffs' assertion that Piccadilly could pay their attorney's fees and costs out of the interest it collected while it withheld moneys owed to them is unpersuasive, as the monetary settlement between the parties included payment of prejudgment interest. Plaintiffs' Exh. H; Defendant's Exh. ZZ However, despite Piccadilly's income losses and declining each balance, it does not appear unable to pay a reasonable attorney's fee in this matter. Accordingly, this factor weighs in favor of plaintiffs.

D. An Award of Attorneys' Fees Would Not Serve a Deterrence Purpose

Given my finding that Piccadilly did not act in bad faith in refusing coverage, conducting this litigation or calculating benefits and premiums, there is no similar conduct to be deterred. Piccadilly's mere legal error in its interpretation of the Plan, an interpretation the presiding district judge in this court accepted and which was not declared erroneous until the Fifth Circuit ruled, is not the type of conduct that this factor is designed to deter. The Fifth Circuit recently explained that

> this factor was intended to be used, as a shield, to protect beneficiaries from the fear of having to pay to pursue an important ERISA claim in the event of failing to prevail. Clearly, Congress intended the fee provisions of ERISA to encourage beneficiaries to assert their rights without fear of being responsible for the fees and costs of their opponent's attorneys if they failed to prevail.

Gibbs, 210 F.3d at 505. That purpose has been accomplished here, as the Fallos have successfully asserted their rights. A fee award to them would not further this purpose.

Piccadilly admits that this litigation itself has already served a deterrent purpose. Piccadilly has revised its Summary Plan Description both in accordance with changes

in the law and, presumably, as a result of this litigation. Memorandum in Opposition to Plaintiffs' Motion for Attorney's Fees and Costs, Record Doc. No. 63, at p.23. Further, a fee award does not serve a deterrent purpose when "Plan administrators merely chose to interpret [a legal] document in the way they found correct." Dial v. NFL Player Supplemental Disability Plan, 174 F.3d 606, 614 (5th Cir. 1999). The presiding district judge agreed with their interpretation.

This factor weighs against granting plaintiffs' motion for attorney's fees and costs.

E. Plaintiffs Did Not Seek to Benefit All Beneficiaries of an ERISA Plan or to Resolve a Significant Legal Question Regarding ERISA Itself

Plaintiffs did not seek, through this lawsuit, to benefit all beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself. Rather, they sought only to receive extended coverage for Mrs. Fallo's disability. They sought neither declaratory nor injunctive relief, nor did they file a class action, either of which would have indicated their intent to benefit other Plan participants or beneficiaries.

This factor also weighs against plaintiffs' motion.

F. The Relative Merits of the Parties' Positions

As indicated by the presiding district judge's grant of summary judgment in favor of Piccadilly and the Fifth Circuit's conclusion that the Plan contained the language on which Piccadilly relied, defendant's position was not "so disproportionately meritless as to justify the imposition of an award of attorneys' fees to [plaintiffs] based on this factor," Gibbs, 210 F.3d at 505, nor were the relative merits "lopsidedly in favor of plaintiff." Roig, 2000 WL at *16. Thus, the Fifth Circuits judgment in favor of plaintiffs and their successful settlement weigh only slightly in favor of granting

their motion.

CONCLUSION

In summary, the first, third and fourth Bowen factors weigh in favor of defendant, while the second and fifth factors weigh only slightly in favor of plaintiffs. While the question is close and the result somewhat surprising and even discomforting given the tortured case history plaintiffs have endured to arrive at this point, I find that strict application of the governing law indicates that the court in its discretion should deny plaintiffs' motion for attorney's fees and costs.

RECOMMENDATION

For all of the foregoing reasons, it is RECOMMENDED that plaintiffs' motion for attorney's fees and costs be DENIED.

New Orleans, Louisiana,
This 16th day of August, 2001.

JOSEPH C. WILKINSON, JR.
UNITED STATES MAGISTRATE JUDGE

No. 94-907

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SCOTT FALLO; KASEY FALLO
Plaintiffs-Appellants,

v.

PICCADILLY CAFETERIAS, INC.; ET AL.,
Defendants,

PICCADILLY CAFETERIAS, INC.,
Defendants-Appellee.

ORDER

The Court, having considered the Report and Recommendation of the Magistrate Judge, and the memoranda filed by both parties in connection therewith, hereby approves the Report and Recommendation of the Magistrate Judge and adopts it as the Court's opinion in this matter. Accordingly,

IT IS ORDERED that plaintiffs' Motion for Attorney's Fees and Costs is DENIED.

New Orleans, Louisiana,
This 26th day of September, 2001.

Peter Beer
United States District Judge

(2)

Supreme Court, U.S.
FILED
OCT 1 2002
CLERK

No. 02-334

In the Supreme Court of the United States

SCOTT FALLO nd KASEY FALO,
Petitioners,

V.

PICCADILLY CAFETERIAS, INC.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENT, PICCADILLY CAFETERIAS, INC.

HAILEY, McNAMARA, HALL, LARMAN & PAPALE, L.L.P,

BY:JOHN T. CULOTTA (#17272)
JULIE DiFULCO ROBLES (#14213)
Counsel of Record
One Galleria Blvd.,. Suite 1400
Post Office Box 8288
Metairie, Louisiana 70011-8288
Telephone: (504) 836-6500

Riverside Printing, L.L.C., 4939 Tchoupitoulas, N. O., LA 70115, (504) 897-5000

102 pp

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether this Honorable Court should grant writ or disturb the findings of the United States Magistrate, the District Judge *and* the United States Court of Appeals for the Fifth Circuit, each of which independently determined that no attorney's fees and costs should be awarded in this matter.

2. Whether Petitioners are improperly seeking a *de novo* review of the underlying Motion for Attorneys' Fees and Costs and are improperly attempting to raise new issues with this Petition.

3. Whether the alleged split in Circuit authority is in reality a distinction without a difference. Stated another way, are Petitioners attempting to *create* a conflict in the Circuits in order to obtain review of the denial of their Motion for Attorneys' Fees and Costs?

4. Whether this Petition improperly seeks to have this Honorable Court invade the province of Congress by "redistributing litigation costs" and fashioning an exception to "the American rule", contrary to the dictates of existing statutory authority and judicial guidelines.

PARTIES TO THE PROCEEDING

Respondent certifies that the following is a complete list of all persons or entities who or which are interested in the outcome of this litigation:

Joseph C. Wilkinson, Jr., United States Magistrate Judge

Honorable Peter Beer, District Judge

United States Fifth Circuit Court of Appeals

Scott Fallo and Kasey Fallo, Petitioners

Piccadilly Cafeterias, Inc., Respondent

DWYER & CAMBRE, Attorneys for Petitioner
STEPHEN I. DWYER (#5130)
SUSANNE CAMBRE (#18159)
MICHELLE MAYNE DAVIS (#23027)
3421 N. Causeway Blvd.
Suite 707
Metairie, LA. 70002
Telephone: (504)838-9090

HAILEY, McNAMARA, HALL, LARMANN & PAPALE, L.L.P., Attorneys for Respondent
JOHN T. CULOTTA (#17272)
JULIE DiFULCO ROBLES (#14213)
One Galleria Blvd., Suite 1400
Post Office Box 8288
Metairie, Louisiana 70011-8288
Telephone: (504) 836-6500

CORPORATE DISCLOSURE STATEMENT IN COMPLIANCE WITH SUPREME COURT RULE 29.6

Piccadilly Cafeterias, Inc. avers that it has no parent corporations nor do any publicly held companies own more than 10% of its stock.

TABLE OF CONTENTS

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW.....i

PARTIES TO THE PROCEEDINGS.....ii
CORPORATE DISCLOSURE STATEMENT

IN COMPLIANCE WITH SUPREME COURT RULE 29.6.....iii

TABLE OF CONTENTS.....iv

TABLE OF AUTHORITIES.....vi

CITATIONS OF DECISIONS BELOW.....1

STATEMENT OF JURISDICTION.....1

RELEVANT PROVISIONS.....2

STATEMENT OF THE CASE.....3
Course of Proceedings and Disposition in Courts below.....3

STATEMENT OF THE FACTS.....5

SUMMARY OF ARGUMENT.....7

ARGUMENT.....11

CONCLUSION.....23

APPENDIX

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEY'S FEES AND COSTS PURSUANT TO 29 U.S.C. §1132(g)(1).....1a

CHRONOLOGY OF THE LITIGATION.....55a

TABLE OF AUTHORITIES

CASES

Alyeska Pipeline Service Co. v.
Wilderness Society, 421 U.S. 240, 95 S.Ct.
1612, 44 L.Ed. 2d 141 (1975).....21

Anita Inc. v. ILGWU Nat'l Retirement Fund,
902 F.2d 185, (2d Cir. 1990).....15

Gibbs v. Gibbs,
210 F.3d 491(5th Cir. 2000).....12,18

Harms v. Cavenham Forest Industries, Inc.,
984 F.2d 686 (5th Cir. 1993).....11

Hummell v. S.E. Rykoff & Co.
Amended Profit-Sharing Plan,
634 F.2d 446 (9th Cir. 1980).....19

Iron Workers Local No. 272 v. Bowen,
624 F.2d 1255 (5th Cir. 1980).....12

Landro v. Glendenning Motorways, Inc.,
625 F.2d 1344 (8th Cir. 1980).....17

Martin v. Arkansas Blue Cross and Blue Shield,
299 F.3d 966 (8th Cir. 2002).....17,18

McElwaine v. US West, Inc.,
176 F.3d 1167 (9th Cir. 1999).....19

Riley v. Admin. of Supersaver 401k,
209 F.3d 780 (5th Cir. 2000).....12,15

Salley v. E.I. Dupont de Nemours & Co.,
966 F.2d 1011 (5th Cir. 1992).....11

Salovaara v. Alfre C. Eckert, III,
222 F.3d 19 (2nd Cir. 2000).....16,17

Todd v. AIG Life Ins. Co.,
47 F.3d 1448 (5th Cir. 1995).....11,12

STATUTES

29 U.S.C. §1001.....3,5

29 U.S.C. §1161.....3,5

28 U.S.C. §1254(1).....1

28 U.S.C. §1291.....1

28 U.S.C. §1331.....1

29 U.S.C. §1132(g)(1).....2,3,4,11,12

28 U.S.C. §1446.....1

OTHER AUTHORITIES

Supreme Court Rule 10.....2

CITATIONS OF DECISIONS BELOW

The Opinion from which Petitioners seek Writ of Certiorari is an unpublished opinion of the United States Court of Appeals for the Fifth Circuit, filed on May 1, 2002. This Opinion, affirming the decision of the Honorable Peter Beer, United States District Judge for the Eastern District of Louisiana, appears in the Petitioners' Appendix at page 1a.

The September 26, 2001 Order of Judge Peter Beer, United States District Judge for the Eastern District of Louisiana, approving and adopting the Report and Recommendation of United States Magistrate Joseph C. Wilkinson, Jr. in its entirety, appears in the Petitioners' Appendix at page 17a.

The Report and Recommendation of United States Magistrate Joseph C. Wilkinson, Jr., issued on August 16, 2001, recommending denial of Petitioners' Motion for Attorneys' Fees and Costs, appears in the Petitioners' Appendix at page 3a.

STATEMENT OF JURISDICTION

This matter was originally removed to the United States District Court, Eastern District of Louisiana, from the Civil District Court for the Parish of Orleans, State of Louisiana, pursuant to 28 U.S.C. §1446 and pursuant to the Federal Question Jurisdiction of the court, 28 U.S.C. §1331. The United States Court of Appeals for the Fifth Circuit exercised jurisdiction over the Appeal from which decision petitioners' seek Writ of Certiorari pursuant to 28 U.S.C. §1291. Petitioners' seek to invoke the jurisdiction of this Honorable Court pursuant to 28 U.S.C. §1254(1).

It is respectfully submitted that this Honorable Court should *decline* the exercise of its supervisory jurisdiction. Petitioners have failed to demonstrate any compelling reasons for the grant of their Petition. Supreme Court Rule 10. Petitioners' misleading attempt to frame this dispute as an opportunity to resolve a split in the Circuits is an effort to obtain *de novo* review of what is simply a denial of a Motion for Attorneys' Fees and Costs by each of the lower courts which have thoroughly reviewed the facts and properly applied the law. Further, Petitioners request that this Honorable Court invade the province of the legislature in order to shift the costs of this litigation in a manner inconsistent with existing law and jurisprudence.

RELEVANT PROVISIONS

Petitioners herein seek recovery of attorneys' fees and costs pursuant to 29 U.S.C. §1132(g)(1) which reads in pertinent part:

> (g) Attorney's fees and costs; awards in actions involving delinquent contributions.
> (1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION IN COURTS BELOW

Scott and Kasey Fallo filed suit in the Civil District Court for the Parish of Orleans, State of Louisiana, on February 10, 1994 against Piccadilly Cafeterias, Inc. (hereinafter "Piccadilly") seeking benefits and other damages allegedly owed pursuant to the Piccadilly Cafeterias, Inc. Health Benefits Plan. On March 17, 1994, this action was properly removed to Federal Court pursuant to the district court's federal question jurisdiction, being a controversy arising out of and governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001, *et seq.* and the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985, 29 U.S.C. §1161, *et seq.*

After a lengthy procedural history[1], following cross-motions for summary judgment decided in favor of Piccadilly, the Fallos filed their first appeal. On May 29, 1998, the United States Court of Appeals for the Fifth Circuit reversed and remanded finding in favor of the Fallos as to the issue of the eleven (11) month extension of coverage but

---

[1] Rather than reiterate the history of this matter in its entirety, Piccadilly incorporates herein and adopts by reference the original Memorandum in Opposition to Plaintiffs' Motion for Attorney's Fees and Costs and the Chronology of the Litigation, submitted by it in connection with the Motion for Attorneys' Fees and Costs. Please see the original Memorandum in Opposition to Plaintiffs' Motion for Attorney's Fees and Costs Pursuant to 29 U.S.C. §1132(g)(1). Respondent's Appendix, page 1a.

remanding on the issue of premiums due. Following remand, shortly before trial, the parties reached a compromise as to the underlying dispute, with Petitioners reserving their rights on the issue of attorneys' fees and costs pursuant to 29 U.S.C. §1132(g)(1).[2]

The fees and costs dispute was then referred to the United States Magistrate. After extensive briefing and a settlement conference with the attorneys, and after carefully weighing and considering all of the facts, circumstances, law and evidence before it, the Magistrate concluded that no fees or costs should be awarded and reported his findings and recommendation to the District Judge. See Petitioners' Appendix, page 3a.

Petitioners filed another motion asking the District Judge not to adopt the Report and Recommendation of the Magistrate and requesting that fees and costs be awarded. Upon consideration of "the Report and Recommendation of the Magistrate Judge, and the memoranda filed by both parties . . ." the District Judge approved the Magistrate's findings and adopted it "as the Court's opinion in this matter." See Petitioners' Appendix, page 17a.

---

[2] The fact of the settlement is not in dispute; however it is necessary to clarify that the underlying settlement amounted to $31,580.76 plus $17,829.80 in interest or a total sum of $49,410.56, *less* premiums in the amount of $2,667.67 plus judicial interest in the amount of $1,506.11. The total benefits less premiums owed, *inclusive of interest*, amounted to $45,236.79. This agreement was reached after *extensive* negotiations. Please see the Chronology of the Litigation, Respondent's Appendix, page 55a at page 71a.

Petitioners then appealed this Order to the United States Court of Appeals for the Fifth Circuit. In an unpublished opinion, the Court of Appeals properly affirmed the

Order of the District Court which adopted the Magistrate's Report and Recommendation stating:

> After reviewing the record and the briefs of the parties, we cannot say that these findings are clearly erroneous or that they represent an abuse of discretion. (Citation omitted).

See May 1, 2002 Opinion of the United States Court of Appeals for the Fifth Circuit, Petitioners' Appendix, page 1a.

STATEMENT OF THE FACTS

In this Petition, as in their brief on appeal, Petitioners endeavor to re-argue the original underlying dispute which has been settled. Petitioners also *re-argue* the Motion for Attorneys' Fees and Costs. Essentially, petitioners seek *de novo* review and ask that this Honorable Court substitute its judgment for that of the Magistrate, the District Judge and the panel of the United States Court of Appeals for the Fifth Circuit. With all due respect to this Honorable Court, Piccadilly submits that this is improper.

As has already been stated, this was a claim for benefits under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001, *et seq.* and the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985, 29 U.S.C. §1161, *et seq.* In an effort to end this litigation,

Piccadilly ultimately settled the underlying dispute; however, Petitioners would not release their claims for attorneys' fees and costs under the federal statutes. The Chronology of the Litigation presents the extensive factual and procedural history and with the Court's indulgence need not be repeated herein. Respondent's Appendix, page 55a *et seq*.

After consideration of the briefs and voluminous exhibits, and after fully, extensively and correctly analyzing the law and facts, the Magistrate issued his seventeen (17) page Report and Recommendation. See Petitioners' Appendix, page 3a. Specifically, after correctly setting out the applicable law[3], which requires a two-step analysis and an examination of a number of factors, the Magistrate found:

> Analysis of the five factors in the instant case presents a painfully close question. ***On balance, however, I find that the factors weigh in favor of Piccadilly and that plaintiffs' motion for attorney's fees should be denied . . .*** (Emphasis added).

Report and Recommendations, Petitioners' Appendix, page 3a at page 8a.

As further stated by the Magistrate and approved and adopted by the District Judge:

---

[3] Indeed, at no time did Petitioners take issue with the law applied by the Magistrate, the District Judge or the Court of Appeals. Rather, Petitioners disputed the *conclusions* reached by the Judges after applying the law to the facts and circumstances of this case. *Petitioners raise the issue of the applicable law and the alleged conflict in the Circuits for the very first time in this Petition for Writ of Certiorari.*

> While the question is close and the result somewhat surprising and even discomforting given the tortured case history plaintiffs have endured to arrive at this point, ***I find that strict application of the governing law indicates that the court in its discretion should deny plaintiffs' motion for attorneys' fees and costs.*** (Emphasis added).

Report and Recommendations, Petitioners' Appendix, page 3a at page 16a.

In light of these findings, approved and adopted by the United States District Judge, and upon review of the record and briefs, the United States Court of Appeals for the Fifth Circuit concluded that there was no abuse of discretion and that it should not disturb this ruling on appeal. It is respectfully submitted that Petitioners herein seek to have a *de novo* review by this Honorable Court of what is a dispute over fees and costs. Petitioners raise an alleged conflict in the circuits and take issue with the applicable law for the first time in this Petition. It is respectfully submitted that this is a guise to get this Honorable Court's attention in Petitioners' ongoing efforts to improperly shift the costs of this litigation to Piccadilly in contravention of statutory and jurisprudential authority. There is no direct conflict in the Circuits as suggested by Petitioners. The various Circuits *use and apply the same factors* in determining whether or not - *in the discretion of the court* - fees and costs should be awarded to either party.

SUMMARY OF ARGUMENT

There is no *real* dispute as to the law applicable to the underlying motion or this appeal. Piccadilly does take issue

with the improper attempt by petitioners to obtain a *de novo* review. Petitioners re-argue the underlying facts and dispute - even attempting for the first time in this Petition to raise an alleged conflict in the law of the Circuits, just as they attempted to assert an alleged conflict of interest for the first time on appeal to the United States Court of Appeals for the Fifth Circuit.[4] All of this is improper.

The only thing at issue before the Fifth Circuit and in this Petition for Writ of Certiorari is whether or not the lower court abused its discretion when it analyzed the applicable law, extensively reviewed the facts and circumstances, and concluded that the Motion for Attorneys' Fees and Costs should be denied in its entirety. If there was no abuse of discretion, as found by the Fifth Circuit, then this Honorable Court should not conduct a de novo review and likewise should not substitute its judgment in place of the Magistrate, the District Judge, or the panel of the Fifth Circuit. Indeed, there is no compelling reason to grant this writ.

Black's Law Dictionary, West, 5th Ed., 1979, defines the term "Abuse of discretion" as:

> Synonymous with ***a failure to exercise a sound, reasonable, and legal discretion.*** It is a strict legal term

---

[4] This Petition is the *first* time that Petitioners take issue with the applicable law. Likewise, on appeal to the Fifth Circuit, Petitioners raised, for the first time, the issue of an alleged conflict of interest on the part of Piccadilly. Petitioners presented no factual, evidentiary or legal support for such an allegation and in fact *never* made such allegation in the district court. Piccadilly submits that this is another desperate attempt to convince this Court to grant the instant writ.

> indicating that [an] appellate court is of [the] opinion that there was [a] commission of an error of law by the trial court. It does not imply intentional wrong or bad faith, or misconduct, nor [is it] any reflection on the judge but means the clearly erroneous conclusion and judgment -- . . . (Citations omitted). A discretion exercised to an end or purpose ***not justified by and clearly against reason and evidence.*** Unreasonable departure from considered precedents and settled judicial custom, constituting error of law. (Citations omitted). "Abuse of discretion" by trial court is any ***unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and law*** pertaining to matter submitted. (Citations omitted). (Emphasis added).

Based upon the foregoing, it is submitted that there has been no abuse of discretion in the case at bar. Rather, the Magistrate Judge made a "painfully close" recommendation. The United States District Court Judge agreed, and adopted the lengthy and well-reasoned report of the Magistrate as his own. The United States Court of Appeals for the Fifth Circuit found no abuse of discretion.

While one may disagree with the outcome, it cannot be said that the decision in favor of Piccadilly was "unreasonable, unconscionable [or] arbitrary". The decision was not "taken without proper consideration of [the] facts and law". *Id.* Therefore, Piccadilly prays that this Honorable Court decline the exercise of its supervisory jurisdiction and deny the Petition for Writ of Certiorari.

Petitioners seek to create a conflict in the application of the law in the various Circuits where none in fact exists. Petitioners assert the existence of a "direct" conflict between the Circuits as to the manner in which the fees provision contained in ERISA is applied.

A review of the law as applied in the Circuits demonstrates that this alleged conflict is nonexistent. The Eighth Circuit decision relied upon by Petitioners has been overruled and that Circuit now applies the same law as the Fifth Circuit. An examination of the other two decisions relied upon by Petitioners reveals that those Circuits actually use the *same factors* which were applied, examined and weighed at length in the case at bar.

The *only* distinction in the cases is in the precise manner in which the factors are applied and examined. As a practical matter this is a distinction without a difference. In two (2) of the Circuits, the courts require the defendant to demonstrate "special circumstances" in order to demonstrate that fees and costs should not be awarded. However, while placing this burden on the defendant, those Circuits apply the same factors which are applied in the rest of the Circuits.

In the case at bar, as a practical matter the burden of proving that Petitioners were not entitled to fees and costs rested on Piccadilly. The Magistrate Judge, the United States District Judge and the panel of the Court of Appeals for the Fifth Circuit found that Piccadilly overcame its burden and demonstrated that Petitioners were not entitled to fees and costs in the case at bar.

Petitioners are asking this Honorable Court to invade the province of Congress and carve out another exception to the "American Rule" which allocates the burden of their respective fees and costs to each litigant. Petitioners seek to overturn years of statutory and jurisprudential authority to the contrary and improperly redistribute the costs of this litigation to Piccadilly.

ARGUMENT

There is no dispute that the Employee Retirement Income Security Act of 1974, §502(g)(1), 29 U.S.C. §1132(g)(1) grants the district court the *discretionary authority* to impose "a reasonable attorney's fee and costs of action to *either* party." (Emphasis added). Of importance here is that *either* prevailing or non-prevailing parties *may* be awarded fees and costs. Such an award is reviewable on appeal only for an abuse of discretion. **Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1458-59 (5th Cir. 1995),** citing **Salley v. E.I. Dupont de Nemours & Co., 966 F.2d 1011, 1016 (5th Cir. 1992).**

In **Todd**, the Fifth Circuit unequivocally reiterated that there should be no presumption in favor of awarding fees and costs. **Todd, 47 F.3d at 1469** *citing* **Harms v. Cavenham Forest Industries, Inc., 984 F.2d 686, 694 (5th Cir. 1993).** Notably, as recognized by the Magistrate Judge in the instant case, the Fifth Circuit has also stated:

> [T]he prevailing status of the parties is not determinative of the fee awards, ***though generally,*** a proper analysis of the five factors ***will in most instances favor an award of fees to the party which has most substantially prevailed.*** (Emphasis added).

Report and Recommendations, Petitioners' Appendix, page 6a, *citing* **Gibbs v. Gibbs, 210 F.3d 491, 504 (5th Cir. 2000).**

In **Todd,** the Fifth Circuit vacated the district court's award of fees and remanded on that issue for reconsideration. The Court held that the district court erred in failing to properly consider the **Bowen** [5] factors in making its award. **Todd, 47 F.3d at 1459.** Specifically, the law in the Circuits is that in order to determine whether to award fees pursuant to 29 U.S.C. §1132(g)(1):

> [A] court should consider such factors as the following: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing party would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' position. (Citation omitted).

Todd, 47 F.3d at 1458.

In **Riley v. Admin. of Supersaver 401k, 209 F.3d 780 (5th Cir. 2000),** the Fifth Circuit affirmed the district court's grant of summary judgment. The district court also denied a request for fees and costs by the prevailing plan. Though the issue of a fee and cost award was waived and was not on appeal, the Fifth Circuit stated:

---

[5] **Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255 (5th Cir. 1980).**

After quoting all five of the *Bowen* factors, however, the district court stated, "[i]n the instant cause, the Court's analysis begins and ends with the degree of Riley's culpability or bad faith." Thus the court never reached the remaining four *Bowen* factors. Yet, nothing in *Bowen, Dial*, or other precedents on point can be read to endow the single factor of culpability or bad faith with exclusive powers of control. By ending its inquiry after considering only that one factor and ignoring the rest, the district court abused its discretion.

* * *

Albeit *dicta* under these circumstances we are constrained to write and publish this analysis to dispel any mistaken belief among the courts of this circuit or potential ERISA litigants that alone the factor of culpability and bad faith somehow supplants the other *Bowen* factors and conclusively determines the outcome of the attorneys' fees issue. To the contrary, *Bowen* makes clear that (1) the list of five factors to be considered in an ERISA § 502(g) attorneys' fees case is a non-exhaustive, *ejusdem generis* list ("[A] court should consider *such factors* as the following [five factors] . . . [I]n any individual case, however, *other considerations may be relevant as well.")* [footnote omitted] and (2) none among the five listed factors is entitled to greater weight - much less unilaterally determinative powers -- than any of the others ("No one of these factors is necessarily decisive, and some may not be apropos in a given case, but together they are the nuclei of concerns that a

court should address in applying Section 502(g).").

> In sum, when considering a request for attorneys' fees under § 502(g) of ERISA, the court should consider and explicate the five *Bowen* factors and should do so without giving predominance or preclusive effect to any one of them; and the court should also consider relevant non-*Bowen* factors, if there are any.

Riley, 209 F.3d 782-783.

Thus, a consideration of all five of the **Bowen** factors is mandatory. Other relevant matters also should be considered. There can be no dispute that in the case at bar the Magistrate Judge went to great lengths to fully consider this matter and undertook an extensive analysis of the **Bowen** factors. The Magistrate Judge had this matter under submission for over two (2) months and even met at length with all counsel prior to issuing his ruling. The Magistrate rendered a thorough and well-reasoned opinion after a full consideration of the facts, evidence and law before it. The District Judge then reviewed the matter and in essence determined that the Magistrate Judge's Report and Recommendation was entirely correct and so well-reasoned that the District Judge adopted that Report in its entirety. The Fifth Circuit then had the matter under consideration for nearly six (6) months before rendering its finding that there had been no abuse of discretion.

It is submitted that the decision below was in no manner arbitrary. It was "painfully close". The decision below was not without consideration of the law. Rather, the Court undertook to analyze the **Bowen** factors and issued a *seventeen (17) page report* on his findings of the facts and law.

Though another court might arrive at a different conclusion, it cannot be said that the decision below is without reason, illogical or unjustified.

Petitioners assert the existence of a "direct" conflict between the Circuits as to the manner in which the fee provision is applied. A review of the law as applied in the Circuits demonstrates that this alleged conflict is nonexistent. Respondent first points out that this alleged conflict was never raised in the courts below. In fact, there was (and is) no dispute as to the applicable law. Petitioners now complain because they hope to attract the attention of this Honorable Court and gain yet another review of their request for attorneys' fees and costs.

Petitioners assert that three (3) of the Circuits, the Second, Eighth and Ninth, apply a presumption in favor of a prevailing plaintiff seeking fees and costs. This is inaccurate.

The Second Circuit applies an almost identical five (5) factor test as was applied by the Fifth Circuit in the case at bar. See **Salovaara v. Alfre C. Eckert, III, 222 F.3d 19 (2nd Cir. 2000)** *citing* **Anita Inc. v. ILGWU Nat'l Retirement Fund, 902 F.2d 185, 191 (2d Cir. 1990).**

After setting forth the five (5) factor **Bowen**[6] test the Second Circuit Court stated:

---

[6] The Court did not refer to the **"Bowen"** factors but listed the identical factors and cited **Todd**, *supra*, along with a number of other decisions from various Circuits.

> As we explained in *Anita Foundations*, the test "provides sufficient latitude to review a fee request by allowing courts to consider which party is requesting fees, assess the relative culpability of the parties and address the potential deleterious effect of the fee award." (Citation omitted).

Salovaara, 222 F.3d at 28.

The Eighth Circuit decision cited by Petitioners to demonstrate the purported conflict has been overruled. **Martin v. Arkansas Blue Cross and Blue Shield, 299 F.3d 966 (8th Cir. 2002)**. In a lengthy and well reasoned decision, the Eighth Circuit Court of Appeals overruled **Landro v. Glendenning Motorways, Inc., 625 F.2d 1344 (8th Cir. 1980)** holding:

> For all of these reasons, ***we agree with the overwhelming majority of circuits that have considered this issue and concluded that the presumption should not be employed in ERISA cases***. Although our circuit was the first to apply the presumption in ERISA fee-shifting cases, we now find that use of several nonexclusive factors best facilitates the exercise of the district court's discretion in ERISA cases. We overrule *Landro's* holding to the contrary. However, we caution that the "five factors" set forth by *Westerhaus* are by no means exclusive or to be mechanically applied. . . . [T]he district courts should use the factors and other relevant considerations as general guidelines for determining when a fee is appropriate.

* * *

> Indeed, Martin admitted at oral argument that few, if any, fee awards have been denied a prevailing plaintiff in ERISA cases nationwide. ***This is true even though nine of the circuit courts of appeals do not employ any kind of presumption in favor of fees.*** Thus, the absence of a presumption has obviously not doomed ERISA plaintiffs' attorney fee requests, and will not do so in this circuit either.
>
> * * *
>
> ***If the factors are to have any force and effect, a plan cannot presumptively be charged with attorney fees every time it is reversed in its decision to deny benefits.*** (Citation omitted). ("The automatic awarding of attorney's fees to the prevailing party would pretermit the exercise of that discretion."). (Emphasis added).

Martin, 299 F.3d at 971-973.

The **Martin** court reviewed the law in all the Circuits and concluded that *the Second and Tenth Circuits do not use a presumption in favor of the prevailing plaintiff* though those Circuits have not expressly rejected it either. **Martin, 299 F.3d at 970.** The Seventh and Ninth Circuits were found to apply the five (5) factors with "a modest presumption" or requiring the defendant to demonstrate "special circumstances" which would show that an award was unwarranted. **Martin, 299 F.3d at 970.** As noted above, the Fifth Circuit recognizes that the five (5) factors will generally balance in favor of a prevailing party. **Gibbs, 210 F.3d at 504**. It is submitted that this is the equivalent of a "modest presumption".

Even the Ninth Circuit has agreed with the Fifth and Tenth Circuits in the use of the five (5) factors as guidelines. See **McElwaine v. US West, Inc., 176 F.3d 1167 (9th Cir. 1999)** and **Hummell v. S.E. Rykoff & Co. Amended Profit-Sharing Plan, 634 F.2d 446 (9th Cir. 1980)** [applying the five (5) factors and requiring the defendant to demonstrate that "special circumstances" exist which would render an award unjust]. As will be discussed below, Piccadilly effectively bore the burden of proof in the case at bar and demonstrated "special circumstances" existed warranting no award of fees and costs. The Magistrate and District Court Judges, as well as the Fifth Circuit Court of Appeals found that an award was unwarranted in the case at bar - in effect finding that an award would be unjust. There is no actual or "direct" conflict in the various Circuit Courts, only the desperate plea of a disgruntled litigant.

In the case at bar, the lower court's analysis of the **Bowen** factors can be summarized as follows:

1). **Bad Faith:**

"While the Fifth Circuit ultimately found Piccadilly's legal position to be incorrect, that does not equate to a finding of bad faith." The Magistrate Judge addressed each and every issue raised by Petitioners and found that *the evidence submitted by Piccadilly negated the Petitioners' assertions*, concluding that "[t]he absence of bad faith by Piccadilly weighs in favor of denying plaintiff's request for attorney's fees and costs." Report and Recommendations, Petitioners' Appendix at pages 9a and 13a. (Emphasis added).

2). **Ability to pay**:

"Plaintiffs' assertion that Piccadilly could pay their attorney's fees and costs out of the interest it collected while it withheld moneys owed to them is unpersuasive, as the monetary settlement between the parties included payment of prejudgment interest. . . However, despite Piccadilly's income losses and declining cash balance, it does not appear unable to pay a reasonable attorney's fee in this matter. Accordingly, this factor weighs in favor of plaintiffs." Report and Recommendations, Petitioners' Appendix at page 14a.

3). **Deterrence:**

"Piccadilly's mere legal error in its interpretation of the Plan, an interpretation the presiding district judge in this court accepted and which was not declared erroneous until the Fifth Circuit ruled, is not the type of conduct that this factor is designed to deter. . . This factor weighs against granting plaintiffs' motion for attorney's fees and costs." Report and Recommendations, Petitioners' Appendix at page 15a.

4). **Benefit to others:**

Plaintiffs "sought only to receive extended coverage for Mrs. Fallo's disability." There was no claim for declaratory or injunctive relief, no class action and no indication of intent to benefit others. "This factor also weighs against plaintiffs' motion." Report and Recommendations, Petitioners' Appendix at page15a.

5). **Relative Merits:**

Given the lower court's ruling in favor of Piccadilly, "and the Fifth Circuit's conclusion that the Plan contained the language on which Piccadilly relied", . . . the "judgment in favor of plaintiffs and their successful settlement weigh only slightly in favor of granting their motion." Report and Recommendations, Petitioners' Appendix at page 15a.

The court concluded:

> In summary, the first, third and fourth Bowen factors weigh in favor of defendant, while the second and fifth factors weigh ***only slightly*** in favor of plaintiffs. While ***the question is close*** and the result ***somewhat surprising*** and even discomforting given the tortured case history plaintiffs have endured to arrive at this point, ***I find that strict application of the governing law indicates that the court in its discretion should deny plaintiffs' motion for attorneys' fees and costs.*** (Emphasis added).

Report and Recommendations, Petitioners' Appendix at page 16a.

Piccadilly submits that as held by the Fifth Circuit Court of Appeals, these findings should not be disturbed. Rather than demonstrate an abuse of discretion, the opinions below reflect much thought and energy given to the rendering of a difficult decision in line with "strict application of the law." While one may disagree, it is submitted that this decision should not be disturbed and this Honorable Court should

not grant writ in the case at bar.

In **Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed. 2d 141 (1975)**, cited out of context by Petitioners for the proposition that consideration of bad faith is unnecessary under a fee shifting statute, this Honorable Court extensively reviewed the jurisprudential history of the "American Rule" [that ordinarily the prevailing litigant is not entitled to collect fees and costs from the losing party] and stated:

> . . .[W]e are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged . . .

421 U.S. at 247, 95 S.Ct. at 1616.

> What Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights.

421 U.S. at 260-261, 95 S.Ct. at 1623.

> But the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested . . . (Footnote omitted).

421 U.S. at 271, 95 S.Ct. at 1628.

> "Congress is aware of the issue." (Citation and footnote omitted). As in that case, "arguments for a further departure from the American Rule... are properly addressed to Congress." (Citation omitted).

421 U.S. at 271, n. 47, 95 S.Ct. at 1628, n. 47.

As in **Alyeska Pipeline**, Petitioners here ask this Honorable Court to depart from the American Rule and redistribute litigation costs in a manner not approved by Congress. As in that case, it is submitted that that would be inappropriate.

CONCLUSION

Piccadilly Cafeterias, Inc. respectfully prays that this Honorable Court decline to exercise its supervisory jurisdiction and deny the Petition. Rather than endeavor to re-argue each and every point raised in the Petition for Writ of Certiorari, Piccadilly has endeavored to present the issues in a clear and concise fashion insofar as these matters already have been addressed at great length. Further, it is submitted that the because the standard of review is for an abuse of discretion, a *de novo* review of all of the underlying facts is not warranted. Contrary to Petitioners' assertions, there is no conflict in the law of the Circuits.

It is requested that should this Honorable Court determine that further inquiry is warranted, that it consider the original Memorandum in Opposition to the Plaintiffs' Motion for Attorneys' Fees and Costs, along with the extensive Chronology of the Litigation. Respondents' Appendix, pages

1a and 55a. To that end Piccadilly incorporates said Memorandum and Chronology herein, as if restated *in toto.*

Respectfully submitted,

HAILEY, McNAMARA, HALL,
LARMANN & PAPALE, L.L.P.

BY:_____

JOHN T. CULOTTA (#17272)
JULIE DiFULCO ROBLES (#14213)
Counsel of Record
One Galleria Blvd., Suite 1400
Post Office Box 8288
Metairie, Louisiana 70011-8288
(504) 836-6500
Attorneys for Respondent,
PICCADILLY CAFETERIAS, INC.

EASTERN DISTRICT OF LOUISIANA

SCOTT FALLO and KASEY FALLO	*	CIVIL ACTION NO.. 94-0907
	*	
versus	*	SECTION "M"
	*	
PICCADILLY CAFETERIAS, INC.	*	MAGISTRATE: (2)

****

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEY'S FEES AND COSTS PURSUANT TO 29 U.S.C. §1132(g)(1)

MAY IT PLEASE THE COURT:

Piccadilly Cafeterias, Inc. (hereinafter "Piccadilly"), submits this Memorandum In Opposition to plaintiffs' Motion for Attorney's Fees and Costs pursuant to 29 U.S.C. §1132(g)(1). Initially, **Piccadilly** respectfully submits that under the facts and circumstances before this Honorable Court, the Motion should be denied in its entirety. In the event this Honorable Court determines that the plaintiffs' are entitled to an award of fees and costs, then **Piccadilly** alternatively submits that the amounts sought are excessive. **Piccadilly** challenges both the hours spent and the hourly rate, as well as the costs incurred which plaintiffs seek to recoup. Should this Honorable Court determine that fees and costs are due, and further that based on the evidence presently before it the amounts sought appear to be proper, then **Piccadilly** would request that the Court bifurcate the issues and allow **Piccadilly** the opportunity to present additional evidence as to the propriety of the amounts of such fees and costs.

I. LAW - DETERMINING WHETHER FEES AND COSTS ARE OWED

In the first instance, the court is required to determine whether fees and costs should be imposed. There is no dispute that the Employee Retirement Income Security Act of 1974, §502(g)(1), 29 U.S.C. §1132(g)(1) grants the Court the *discretionary authority* to impose "a *reasonable* attorney's fee and costs of action to *either* party." (emphasis added) Of importance here is that either prevailing or non-prevailing parties *may* be awarded fees and costs. Such an award is reviewable on appeal only for an abuse of discretion. **Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1458-59 (5th Cir. 1995)**, citing **Salley v. E.I. Dupont de Nemours & Co., 966 F.2d 1011, 1016 (5th Cir. 1992)**. In **Todd,** the Fifth Circuit unequivocally reiterated that in this Circuit, there is no presumption in favor of awarding fees and costs. **Todd, 47 F.3d at 1469** citing **Harms v. Cavenham Forest Industries, Inc., 984 F.2d 686, 694 (5th Cir. 1993).**

In **Todd,** the Fifth Circuit vacated the District Court's award of fees and remanded on that issue for reconsideration. The Court held that the District Court erred in failing to properly consider the Bowen factors in making its award. **Todd, 47 F.3d at 1459.** Specifically, the law in the Fifth Circuit is that in order to determine whether to award fees pursuant to 29 U.S.C. §1132(g)(1):

> [A] court should consider such factors as the following: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorneys' fees; (3) whether an

award of attorneys' fees against the opposing party would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' position.

Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1266 5th Cir. 1980).

Todd, 47 F.3d at 1458.

In **Riley v. Admin. of Supersaver 401k, 209 F.3d 780 (5th Cir. 2000)**, the Fifth Circuit affirmed the District Court's grant of summary judgment. The District Court also denied a request for fees and costs by the prevailing plan. Though the issue of a fee and cost award was waived and was not on appeal, the Fifth Circuit stated:

After quoting all five of the *Bowen* factors, however, the district court stated, "[i]n the instant cause, the Court's analysis begins and ends with the degree of Riley's culpability or bad faith." Thus the court never reached the remaining four Bowen factors. Yet, nothing in *Bowen, Dial*, or other precedents on point can be read to endow the single factor of culpability or bad faith with exclusive powers of control. By ending its inquiry after considering only that one factor and ignoring the rest, the district court abused its discretion.

* * *

> Albeit dicta under these circumstances we are constrained to write and publish this analysis to dispel any mistaken belief among the courts of this circuit or potential ERISA litigants that alone the factor of culpability and bad faith somehow supplants the other *Bowen* factors and conclusively determines the outcome of the attorneys' fees issue. To the contrary, *Bowen* makes clear that (1) the list of five factors to be considered in an ERISA § 502(g) attorneys' fees case is a non-exhaustive, *ejusdem generis* list ("[A] court should consider *such factors* as the following [five factors] . . . [I]n any individual case, however, *other considerations may be relevant as well.")* [footnote omitted] and (2) none among the five listed factors is entitled to greater weight - much less unilaterally determinative powers -- than any of the others ("No one of these factors is necessarily decisive, and some may not be apropos in a given case, but together they are the nuclei of concerns that a court should address in applying Section 502(g).").
>
> In sum, when considering a request for attorneys' fees under § 502(g) of ERISA, the court should consider and explicate the five *Bowen* factors and should do so without giving predominance or preclusive effect to any one of them; and the court should also consider relevant non-*Bowen* factors, if there are any.

Riley, 209 F.3d 782-783.

Thus, a consideration of all five of the **Bowen** factors is mandatory. Other relevant matters should also be considered.

II. THE FACTS AT BAR

In the Motion presently before the Court, plaintiffs present a number of arguments which range from the alleged unreasonableness of **Piccadilly's** initial denial of coverage and extension of benefits to the handling of this litigation throughout, as well as in the aftermath of the appellate ruling. Plaintiffs have attempted to identify discreet events and pleadings which they variously assert demonstrate **Piccadilly's** "bad faith" and alleged dilatory practices. Rather than equally addressing all of the **Bowen** factors, plaintiffs have attempted to demonstrate **Piccadilly's** bad faith and have emphasized that one (1) factor to a greater extent than the others.

It is respectfully submitted that a thorough review of the *entire* record, the actions of the parties and their counsel, the decisions by both the District Court and the Court of Appeals, as well as a review of an *accurate and detailed chronology of events* demonstrates that application of all of the **Bowen** factors, as well as other relevant information addressed below, leads to the conclusion that no award should be made in the case at bar.

Attached hereto as **Exhibit "1"** is a detailed Chronology of Events from the time this litigation was filed on February 10, 1994. **Piccadilly** has not provided a detailed chronology of the pre-litigation events because such matters were extensively and adequately covered in the multiple Motions for Summary Judgment and Appellate Brief, as well as the Exhibits attached thereto. **Piccadilly** respectfully incorporates by reference herein those pleadings and submits that what occurred prior to the filing of litigation is not

presently in dispute.

Piccadilly has endeavored to supply this Honorable Court with pertinent correspondence, discovery pleadings, and other notes from counsel's file materials and has attached such documents and information to the chronology in an effort to supply this Honorable Court with a complete, accurate, and detailed picture of the totality of events which occurred over the last seven (7) years. **Piccadilly** respectfully requests this Honorable Court to indulge it with a thorough review of this chronology and the attached exhibits insofar as **Piccadilly** believes that such a review will lead to the inescapable conclusion that at all times **Piccadilly** and its counsel have acted in good faith and not acted arbitrarily or capriciously or without cause. **Piccadilly** submits that plaintiffs themselves and their counsel share equally in the responsibility for any delays in this matter.

By way of example, **Piccadilly** points out that plaintiffs initially filed this matter in State Court and included negligence, punitive damage and Americans with Disabilities Acts claims, as well as claims that they were entitled to "indefinite benefits." **Piccadilly** properly removed this matter to Federal Court and less than thirty (30) days after the service of this suit, which service included discovery by plaintiffs, filed its Answer and responded to such discovery. **Piccadilly** then filed its Original Motion for Summary Judgment on April 4, 1994 (attached as **Exhibit "A"**).

The hearing on the Motion for Summary Judgment was initially continued at the request of counsel for plaintiffs (attached hereto as **Exhibit "B"**). In its ruling on this

Original Motion, the District Court granted **Piccadilly's** Motion in part, throwing out all claims but the COBRA, extension of benefits claim. In fact, plaintiffs did not even oppose that portion of the Motion for Summary Judgment dealing with the remaining claims, and **Piccadilly** respectfully submits that such claims were unfounded and frivolous to begin with. Nevertheless, **Piccadilly** was required to respond to such claims and seek a formal dismissal by way of summary judgment (attached hereto as **Exhibit "D"**).

As early as July 15, 1994, counsel for **Piccadilly** requested all medical expense information and the parties discussed settlement (attached hereto as **Exhibit "E"**[1]). **Piccadilly** propounded formal discovery to plaintiffs seeking complete medical treatment and expense information (attached hereto as **Exhibit "F"**). Plaintiffs first obtained an extension on responding to this discovery, subsequently filed incomplete responses to the discovery, promised to provide additional information and finally provided some of the additional information requested on October 13, 1994 (attached hereto as **Exhibits "H", "J" and "K"**). In the interim, **Piccadilly** was endeavoring to obtain Social Security Administration records and despite numerous requests, did not get such records until December 21, 1994 (attached hereto as **Exhibits "I", "L", "M", and "N"**).

Piccadilly filed its Motion reurging the Motion for Summary Judgment on January 10, 1995 (attached hereto as

---

[1] **Piccadilly** does not waive the attorney-client privilege by attachment of this correspondence which it does for the sole purpose of evidencing the contact with plaintiffs' counsel.

Exhibit "O"). This pleading apparently crossed in the mail with the plaintiffs' request for a Status Conference. Plaintiffs subsequently requested a continuance of the hearing on the newly filed Motion (attached hereto as **Exhibit "P"**). Plaintiffs finally filed their Opposition to this Motion on March 9, 1995 to which **Piccadilly** replied (attached hereto as **Exhibit "Q"**). The Court denied the Motion again on March 17, 1995 (attached hereto as **Exhibit "R"**).

The Social Security Administration finally issued its initial denial of benefits on March 24, 1995. **Piccadilly** sought and was granted a stay of proceedings pending a final determination of the Social Security Administration on the appeal ultimately filed by plaintiffs (attached hereto as **Exhibits "T" and "U"**). ***This matter was stayed due to a lack of decision by the Social Security Administration between June 19, 1995 and November 19, 1996.*** While **Piccadilly** acknowledges that this stay was at its request, it is submitted that *at that time,* it appeared to be the appropriate action. The Honorable Peter Beer agreed. **Piccadilly** should not be held responsible for administrative delays of eighteen (18) months by the Federal Government. Nonetheless, **Piccadilly**, in fact, has already paid for this delay in settlement of the underlying claims, which settlement included over $17,000.00 in judicial interest calculated from the date the suit was filed in February, 1994 through March 5, 2001. See settlement correspondence dated February 28, 2001 (attached hereto as **Exhibit "ZZ"**). During this period, **Piccadilly** attempted to obtain information on the status of the appeal by correspondence dated September 26, 1995 (attached hereto as **Exhibit "V"**).

When the Social Security appeal ruling was issued on November 27, 1996 (attached hereto as **Exhibit "W"**), **Piccadilly** did not become aware of such a decision until December of that year (attached hereto as **Exhibit "X"**). . That decision became final January 26, 1997. ***Plaintiffs took no steps to prosecute this matter further until the filing of the Motion for Summary Judgment on April 11, 1997.*** **Piccadilly** filed its Cross-Motion on May 6, 1997 (attached hereto as **Exhibit "Y"**) and the District Court ruled on these Cross-Motions, in favor of ***Piccadilly*** by Order dated July 28, 1997 and judgment entered August 14, 1997 (attached hereto as **Exhibit "Z"**) .

The plaintiffs appealed. *This matter remained pending on appeal from December 3, 1997 through May 29, 1998, when the Fifth Circuit issued its decision* (attached hereto as **Exhibit "AA"**) . Again, **Piccadilly** should not be held responsible for this delay.

At that point in time, **Piccadilly** continued to believe that its premium calculations initially submitted by Affidavit of Jeanita Slaton in connection with the Cross-Motions for Summary Judgment filed May 6, 1997, were correct. Further, throughout the time period following the filing of Cross-Motions, **Piccadilly's** position that the premiums due exceeded the amounts which would be payable based upon "a review of the charges and expenses submitted by Scott Fallo and Kasey Fallo *to date* . . ." (emphasis added) went unchallenged. At no time, until counsel for **Piccadilly** and then counsel for plaintiffs, Vicki Olson, met face-to-face on October 15, 1999, did plaintiffs ever suggest that **Piccadilly's** calculations were in any manner incorrect.

In fact, in the course of the Status Conference held September 14, 1999, counsel for plaintiffs admitted that additional medical information remained outstanding. In November, 1999, and December, 1999, additional medical records and invoices were submitted by plaintiffs "for consideration for payment", see letter dated November 1, 1999 attached hereto as **Exhibit "DD"**, and further advised that they were still waiting for some additional records, see **Exhibit "EE"** dated December 13, 1999.

In an effort to ensure that it was now in possession of all allegedly outstanding information, **Piccadilly** forwarded formal discovery to plaintiffs on January 27, 2000 (attached hereto as **Exhibit "FF"**) . When no responses or additional information were forthcoming, **Piccadilly** corresponded to counsel for plaintiffs requesting a response to the discovery (attached hereto as **Exhibit "GG"**).

Subsequently, on numerous occasions as set forth in the chronology, counsel for plaintiffs advised that they were waiting on records (attached hereto as **Exhibits "II", "JJ", and "NN")** and on two (2) occasions, plaintiffs joined in the statement that "despite due diligence, requests for some of these records are outstanding." (See Motions to Continue attached hereto as **Exhibits "HH" and "MM"**). **Piccadilly** continuously informed counsel for plaintiffs that it needed all medical records and billing records in order to process all of these claims properly (attached hereto as **Exhibits "KK" and "LL"**) .

By correspondence dated September 18, 2000, plaintiffs' new counsel, Michelle Davis, admitted that the premium and benefits payable figures may have changed and were

"presently being updated", see letter dated September 18, 2000 attached hereto as **Exhibit "OO"**. At each subsequent contact, **Piccadilly** remained responsive to plaintiffs and maintained that it was unable to process non-itemized statements (attached hereto as **Exhibits "PP" and "QQ"**).

By correspondence dated October 2, 2000, attached hereto as **Exhibit "RR"**, counsel for plaintiffs confesses that she could not find some information in her file stating "given that the file is over six (6) years old, I am surprised that I can find anything!" Ironically, in their Memorandum, plaintiffs' condemn undersigned counsel's statement that research would be needed because of the dormancy of this matter. (See correspondence dated September 23, 1999 attached to plaintiffs' Memorandum as **Exhibit "D"**). In fact, undersigned counsel is frankly outraged that plaintiffs and their counsel would take this position at this time, in complete contradiction of the professional discussions and mutual courtesies with which this matter had been handled in the interim (at least from this attorney's perspective).[2]

On October 5, 2000, counsel for plaintiffs and counsel for **Piccadilly** traded letters in which counsel for plaintiffs advised that she still was attempting to obtain an itemized billing statement from Ochsner Clinic and **Piccadilly** counsel reiterated that the figures in the original Affidavit of Jeanita Slaton had changed due to an error in the calculation of premiums and due to additional information submitted by counsel's office. See plaintiffs' counsel's letter dated

---

[2] The intent of the use of those words was simply that the file was old and Ms. Slaton would need to pull and review the records in order to refresh her memory.

October 5, 2000 attached hereto as **"Exhibit "SS"** and undersigned counsel's letter dated October 5, 2000 attached hereto as **"Exhibit " TT"**.

In the Status Conference held October 18, 2000, plaintiffs' counsel advised that she was going to issue another subpoena to Ochsner but then forwarded a letter on October 20, 2000 stating that the records had previously been forwarded. When this confusion was somewhat cleared up on November 21, 2000, counsel for **Piccadilly** advised of the ongoing difficulties in processing the Ochsner Clinic records because of the coding and the dates of service. In no small part, this was due to the age of the claims at this point. Counsel for **Piccadilly** points out again that *at no time between May 6, 1997 and October, 19, 1999, had counsel for plaintiffs endeavored to obtain additional records, submit claims information, clarify any of the bills previously submitted, or question the premium and benefits calculations.*

Piccadilly also submits that contrary to the assertions contained within the Memorandum in Support of this Motion, the chronology attached and as recited herein up to this point, demonstrates that **Piccadilly** did in fact endeavor to investigate and that if **Piccadilly** was dilatory, plaintiffs themselves failed to properly submit proof of claim, an indisputable requirement and general accepted insurance practice. Contrary to plaintiffs' assertions, the onus is not strictly upon the administrator to investigate *improperly submitted claims.* **See Gooden v. Providant Life and Accident Insurance Company, 2001 U.S. App. LEXIS 9204 (5th Cir. May 14, 2001 as revised May 16, 2001) citing Vega v. National Life Insurance Servs., Inc., 188 F.3d 287, 295 (5th Cir. 1999)**

(en banc). For the Court's convenience, a copy of the **Gooden** decision is attached hereto as **Exhibit "2".**

Counsel for plaintiffs finally provided clarification regarding the Ochsner Clinic statement dates on December 8, 2000, following which **Piccadilly** attempted to process the claims but as it advised plaintiffs' counsel on January 30, 2001, because of the age of the claims, the need to recreate coding information from 1994, and the need to "suspend" the claims, **Piccadilly** was having continuing difficulty processing the information. Nevertheless, on February 1, 2001, **Piccadilly** completed its review and advised plaintiffs' counsel that prior to issuing payment, it needed proof that payment had been made by plaintiffs to the providers in order to protect itself from any medical liens. **Piccadilly** also provided premium recalculation information at that time (attached hereto as **Exhibit "VV"**) .

Settlement discussion earnestly took place throughout the month of February in light of the then trial date of March 5, 2001. Notably, plaintiffs submitted even more information regarding some of the denied charges, advising that she had "not found any record of Vicki Olson having forwarded these to you . . ." See plaintiffs' counsel's correspondence dated February 6, 2000 attached hereto as **Exhibit "WW"**. See also subsequent correspondence dated February 7, 2001 attached hereto as **Exhibit "XX"**. In an effort to amicably resolve these matters, **Piccadilly** itself raised the possibility of charging a "single" or individual premium rather than a "family" premium (attached hereto as **Exhibit "YY"**) . Plaintiffs denounced this as evidence of Piccadilly's alleged

deception. [3]

As set forth above, the matter ultimately settled with Piccadilly *agreeing* to pay pre-judgment interest in the amount of $17,829.80 (attached hereto as **Exhibit "ZZ"**). Hence, the parties, unable to agree to a resolution of the fees and costs issue, are now before this Court. Plaintiffs attempt to suggest that **Piccadilly** was in bad faith in first refusing to proceed before a Magistrate and subsequently agreeing to this. This is an attempt to compare apples and oranges as the two (2) matters under consideration were and are separate. The underlying claims now having been settled, Piccadilly agreed to proceed before this Magistrate.

III. PLAINTIFFS' CASE LAW

Piccadilly confesses that it was somewhat confused by some of the cases cited by plaintiffs. Some of the cases appear to be cited for propositions that are not in dispute and are not before the Court at the present time. To the extent that the cases cited are intended to support plaintiffs' Motion, such cases are distinguishable and do not support an award in this matter.

---

[3] **Piccadilly** points out that had it never raised this question, plaintiffs would likely have ultimately agreed to the family premium calculation. **Piccadilly** raised the issue in settlement discussions and subsequently for strategic reasons, decided to "back off" and simply agree to the single premium. This was not, and should not be taken as an admission on **Piccadilly's** part. As part of the settlement negotiations, such information should be excluded from evidence in any event. **Piccadilly** notes that this issue of family versus single premium rate arose due to changes in the law in the interim years.

Poole v. Monmouth College, 254 N.J. Super. 154; 603 A.2d 118; 1991 N.J. Super. LEXIS 463 (N.J. Super. 1991) comes out of the New Jersey State Courts. **Poole** did involve a question of continuation of benefits, as here, however, in finding for plaintiff on continuation, the **Poole** Court assessed the premiums due and held that "it would be inappropriate to assess a penalty without a complete record" and found that this would require an evidentiary hearing. **Poole 254 N.J. Super. at 165, 603 A.2d at 123-124, and 165-166. Piccadilly** also points out that in that case, the defendants failed to notify the plaintiff of her COBRA extension rights to begin with and then claimed her notice was untimely. In *dicta*, and in footnote, the New Jersey Court suggested that an award of fees and costs would not necessarily require a finding of bad faith or malice. This, however, is contrary to the law of the Fifth Circuit as set forth and discussed above.

Bowen, itself, demonstrates the need for a complete record. **Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255; 1980 U.S. App. LEXIS 14586 (5th Cir. 1980)** *on appeal after remand* **695 F.2d 531; 1983 U.S. App. LEXIS 31399 (11th Cir. 1983). Bowen** involved claims of *fiduciary misconduct*[4] and improper actions by trustees. The Court initially remanded for clarification setting out the factors to be considered by a District Court in determining whether or not attorney's fees and costs should be awarded. Discussed supra. *After a two (2) day evidentiary ruling* "to

---

[4] As noted by the Court in **Bowen**, an examination of whether or not someone has breached a fiduciary responsibility requires the Court to examine a different set of standards. Further, the Court noted that this would *add* information and be an additional factor to consider in connection with a claim for fees and costs. **Bowen, 624 F.2d at 1266-1267.**

allow defendants to test the accuracy of plaintiffs' records," the District Court awarded fees. This was upheld on appeal. **Id.**

Also cited by plaintiff is **Donovan v. Cunningham, 716 F.2d 1455; 1983 U.S. App. LEXIS 16008 (5th Cir. 1983)**. That case involved an employee stock ownership plan (ESOP), a breach of fiduciary duties, and unfounded third party claims. There, the Fifth Circuit reviewed the District Court action on the request for fees under an abuse of discretion standard. Factually, the **Donovan** case is totally discimilar to that at bar and is not of assistance here.

Salley, *supra*, involved the termination of psychiatric benefits. **Piccadilly** does not dispute that the **Salley** case properly sets forth the standards of review. In that case, finding that there was an abuse of discretion in the termination of benefits, the Fifth Circuit upheld the District Court ruling which included an award of fees based on the **Bowen** factors. The Fifth Circuit also approved the District Court's imposition of sanctions against the prevailing party which sanctions *decreased* the amount of fees awarded and *required each party to bear its own costs.* **Salley, 966 F.2d at 1016-1017.**

Plaintiffs cite **Penn v. Howe-Baker Engineers, Inc., 898 F.2d 1096; 1990** U.S. App. LEXIS 6242 (5th Cir. 1990). In that case, the Fifth Circuit affirmed the denial of fees and costs to a non-prevailing plaintiff finding no abuse of discretion. **National Companies Health Benefit Plan v. St. Joseph Hospital of Atlanta, Inc., 929 F.2d 1558; 1991** U.S. App. LEXIS 7811 (11th Cir. 1991) also cited by the plaintiffs is likewise distinguishable. This was a declaratory judgment action involving three (3) insurance carriers and an important, unresolved question of ERISA law. There, the Eleventh

Circuit was required to determine which group health plan was responsible for medical claims. There, the Court held that one (1) of the carriers acted in bad faith. "This is not a case in which the employer initially refused to provide continuation coverage based on its interpretation of ERISA." **National Companies, 929 F.2d at 1575.** There, the carrier initially represented that there was continuation coverage and then "changed its mind and tried to avoid its obligation." **Id.** The Court examined all of the **Bowen** factors and affirmed the District Court award of fees and costs. In so doing, the Eleventh Circuit stated:

> No one of these factors is necessarily decisive, and some may not be appropos in a given case. [citing Bowen, 624 F.2d at 1266.]

National Companies, 929 F.2d at 1575.

IV. THE BOWEN TEST

A. The degree of the opposing party's culpability or bad faith.

In the case at bar, **Piccadilly** submits that neither the District Court nor the Appellate Court found evidence of bad faith in **Piccadilly's** position. Specifically, in its ruling on the first Motion for Summary Judgment, the District Judge, Honorable Peter Beer, first granted summary judgment dismissing plaintiffs' claims which sought continued coverage or conversion to a private plan. The Court also dismissed

plaintiffs' claims under the Americans with Disabilities Act.[5] The Court denied that portion of the summary judgment pertaining to the question of an extension of COBRA coverage finding the Summary Plan Description (SPD) "slightly ambiguous." Order dated July 7, 1994, at p. 5, attached hereto as **Exhibit "D"**. The Court further stated:

> Whether, here, this language creates liability for **Piccadilly** is a close call. Accordingly, at this time, the Court will not embark on an exquisite analysis regarding what, if any, liability exist. (sic) Nonetheless, the language raises just enough of a question - - leaving the benefit of the doubt to the non-movant - - to preclude summary judgment at this time.

Order dated July 7, 1994 at p. 5 attached hereto as **Exhibit "D"**. The Court explicitly left open the possibility of reconsideration as more facts developed.

Thus, from the very beginning, and throughout this litigation, the dispute was a "close call." **Dial v. NFL Player Supp. Disability Plan, 174 F.3d 606, 614 (5th Cir. 1999), Izzarelli v. Rexene Products Co., 24 F.3d 1506, 1526 (5th Cir. 1994). Harms, 984 F.2d at 694. Wildbur v. Atlantic Richfield Retirement Plan, 765 F.Supp. 891, 896** *vacated on other grounds* **974 F.2d 631**, *rehearing denied* **979 F.2d 1013 (W.D.LA. 1991)**.

---

[5] As pointed out by the Court, plaintiffs submitted no evidence in support of their allegations nor did they oppose the Motion for Summary Judgment in these respects.

Subsequently, **Piccadilly** reurged the Motion for Summary Judgment based on additional facts that had been obtained. Although the Motion was again denied, in its Order dated March 15, 1995, the Court merely found that an issue of fact existed which precluded summary judgment *at that time*. See Order dated March 17, 1995, attached hereto as **Exhibit "R".**

> Although ambiguities in the plan are to be resolved in favor of the plan participant, this Court will not create an ambiguity where none exists. At first blush, this Court noted an ambiguity possibly existed over whether a determination of disability must be made by Social Security. Clearly, however, plaintiffs understood the plan as requiring a disability determination by the Social Security office as evidenced by the Affidavit of Clifford Olsen who indicates that he initiated the Social Security process prior to the expiration of the eighteen (18) month period. Additionally, as evidenced by the Affidavit, plaintiffs understood the plan as requiring at least initiation of Social Security procedures prior to the expiration of the eighteen (18) month period. It is inconceivable and an unreasonable interpretation of the plan that plaintiff would be allowed the eleven (11) month extension based upon the mere statement in the letter that Ms. Fallo is disabled. Accordingly, this Court finds that the plan requires initiation of the Social Security procedures within the eighteen (18) month extension period for a beneficiary to be eligible for the eleven (11) month extension based upon disability.

See Order dated March 17, 1995 attached hereto as **Exhibit "R"**, last unnumbered page.

Finally, after the Social Security administration issued its appellate ruling in favor of Kasey Fallo, finding a disability existed, on Cross-Motions for Summary Judgment, the Court ruled in favor of **Piccadilly** entering judgment in its favor on August 14, 1997. See Judgment attached hereto as **Exhibit "Z".** The District Court specifically found that the Affidavit submitted by plaintiffs was contradicted by the Social Security Administration itself and determined that "the fact remains undisputed that the Application was not filed until six (6) months after the expiration of the eighteen (18) months of COBRA benefits." See Order dated July 28, 1997 attached hereto as **Exhibit "Z"**, last unnumbered page.

At that point, the Fallos appealed this final decision to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit reversed and remanded finding that on the facts before it, the District Court was in error (attached hereto as **Exhibit "AA"**) . The Fifth Circuit held that the Summary Plan Description did not support the District Court's interpretation and instead accepted a broader reading, concluding that the time of initiation of the Social Security Administration disability proceedings was not controlling. In fact, the Court relied in part upon language set forth in **Piccadilly's** Motion for Stay of Proceedings pending the Social Security determination. See the Opinion of the United States Court of Appeals for the Fifth Circuit filed on May 29, 1998 attached hereto as

Exhibit "AA".[6]

At no point in these proceedings has any Court suggested that **Piccadilly** acted other than in good faith. In fact, **Piccadilly** would submit that it is obligated, under this self-insured plan, to ensure that it properly distributes benefits. If it improperly distributed benefits, **Piccadilly** would then be unable to provide benefits when due. There has never been a holding or ruling in this matter that **Piccadilly's** interpretation and position was unreasonable, arbitrary or capricious, or in any way taken in bad faith.

Plaintiffs' brief wanders between arguing the merits and arguing the procedural course of this litigation as evidence of **Piccadilly's** bad faith. As set forth in the detailed chronology, attached hereto as **Exhibit "1"**, and discussed in detail above, there are an equal number of examples of plain

---

[6] **Piccadilly** notes that it considered filing a Motion for Rehearing insofar as the Fifth Circuit opinion relied in part on the language contained in **Piccadilly's** Motion for Stay of Proceedings, treating this almost as a judicial admission. **Piccadilly** notes that this was not a change of position on its part but rather was a statement based upon facts learned a*fter* the original Motion for Summary Judgment was filed and before the Social Security Administration issued the appeal ruling. See Memorandum of Authorities in Support of Motion Re-Urging Motion for Summary Judgment filed January 10, 1995, attached hereto as **Exhibit "O"**. **Piccadilly's** position was that without even initiating the Social Security Disability proceedings prior to the expiration of the initial eighteen (18) months of COBRA coverage, plaintiffs could not be in compliance with the SPD, the Plan or COBRA itself. See also Reply Memorandum in Support of Motion for Summary Judgment filed June 13, 1994, attached hereto as **Exhibit "C"**. Thus, plaintiffs' assertions notwithstanding, **Piccadilly** has been consistent in its objections to the extension of coverage.

tiffs' delays as that of **Piccadilly.** **Piccadilly** submits that this is a case of "people who live in glass houses should not throw stones." Plaintiffs' Memorandum in Support of this Motion mischaracterizes **Piccadilly's** stance in this litigation. Plaintiffs attempt to suggest that **Piccadilly** "changed its mind" for no reason other than its own benefit. It is submitted that a full reading of the record and **Piccadilly's** pleadings and correspondence belies this assertion.

B. <u>The ability of the opposing parties to satisfy an award of attorneys' fees.</u>

It is respectfully submitted that the parties are on relatively equal footing with regard to the payment of fees. Plaintiffs admit that they have already paid the fees at issue in this litigation and are seeking reimbursement. **Piccadilly** has already paid its counsel fees in connection with this litigation and continues to incur additional fees due to the filing of this Motion which plaintiffs refused to resolve amicably. **Piccadilly** submits that there should be no presumption that it is able to pay these not insubstantial fees and costs which are sought. **Piccadilly** is a corporation which must answer to its shareholders. Should this Honorable Court require additional evidence in connection with this issue, **Piccadilly** respectfully requests the opportunity to submit an Affidavit and other documentation.[7] Plaintiffs disingenuously submit

---

[7] The personnel whom **Piccadilly** counsel must contact have been out of the office for various reasons and **Piccadilly** counsel has not been able to obtain an Affidavit and/or documentation in time to submit concurrently herewith. In the final analysis, **Piccadilly** submits that its payment of pre-judgment interest and the underlying settlement should also be taken into account in connection with this factor. These amounts are not "loose change."

that **Piccadilly** "could probably pay the attorney's fees and costs out of the seven (7) plus years of interests it has been earning on the money due to the Fallos." See Memorandum in Support of plaintiffs' Motion. In light of the fact that **Piccadilly** has already paid this interest to plaintiffs, this is an attempt to mislead this Honorable Court.

C. Whether an award of attorneys' fees agains the opposing parties would deter other persons acting under similar circumstances.

Contrary to the plaintiffs' assertions in their Memorandum, it is respectfully submitted that an award of fees in this matter *would not* serve the purpose intended by Congress in enacting the attorneys' fee provisions in the ERISA context. Again, plaintiffs disregard the interest amounts already paid by **Piccadilly** asserting that **Piccadilly** would only be liable "for what it should have covered before this litigation commenced." **Piccadilly** would not have had to pay judicial interest. Thus, plaintiffs again attempt to mislead.

In light of the language of the Summary Plan Description at issue in this litigation, and *the state of the law which has been amended since that time,* it is respectfully submitted that an attorneys' fee award would serve no deterrent purpose. An award in this matter would not serve as an incentive to ensure the enforcement of the statute. See **Harms, 984 F.2d at 694, citing Bowen, 624 F.2d at 1265-1266.**

In **Gibbs v. Gibbs, 210 F.3d 491 (5th Cir. 2000),** a

complicated case involving conflicting claims from beneficiaries to life insurance proceeds, the Court reviewed the District Court's decisions pertaining to fees and costs. In finding that the District Court, in fact, abused its discretion in awarding one (1) of the parties fees and costs, the Court stated:

> The district court used the third deterrent factor as a sword to discourage beneficiaries from pursuing a claim when they are suspected of being involved in the insured's death, rather than as this factor was intended to be used, as a shield, to protect beneficiaries from the fear of having to pay to pursue an important ERISA claim in the event of failing to prevail. *Clearly, Congress intended the fee provisions of ERISA to encourage beneficiaries to assert their rights without fear of being responsible for the fees and costs of their opponent's attorneys if they failed to prevail.*

Gibbs, 210 F.3d at 505.

Piccadilly submits that the imposition of attorneys fees in this matter would "add insult to injury" when this matter is considered in its entirety. Just as beneficiaries should not be fearful of asserting important ERISA claims, administrators should not fear good faith reliance upon the language of an SPD and the law (as it existed at that time) in denying benefits. As stated above, administrators must be mindful of their duty to properly enforce the provisions of the plan in order to preserve the assets of the plan for those properly submitted claims. See **Ramsey v. Colonial Life Insurance Company of America, 12 F.3d 472, 480 (5th**

Cir. 1994); Holder v. Prudential Insurance Company of America, 951 F.2d 89, 91-92 (5th Cir. 1992).

Piccadilly submits that this litigation itself has already served a deterrent purpose, should that be deemed necessary. **Piccadilly** has revised its plan in accordance with changes in the law over the course of the last seven (7) years. Likewise, the SPD has been revised. For example, **Piccadilly** points out that the very statutory provision at issue in this litigation has been amended by the legislature and there have been other decisions which have clarified this particular issue. See the statutory amendments effective on and after January 1, 1997, which specify that the qualified beneficiary no longer has to demonstrate disability as of the date of the original qualifying event but would be entitled to the eleven (11) month extension if it is demonstrated that he was disabled under Title II or XVI of the Social Security Act at any time within the first sixty (60) days of COBRA continuation coverage. See the Health Insurance Portability and Accountability Act of 1996. (HIPAA). While not retroactive, this language makes clear the intent that the finding of Social Security Disability must be made and, therefore, at least applied for, prior to the expiration of the initial eighteen (18) months of COBRA coverage. See **29 U.S.C. §§ 1161 and 1162(2)(A)(iv).** For all of the foregoing reasons, **Piccadilly** submits again that this factor does not weigh in favor of an award.

D. Whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself.

In connection with this **Bowen** factor, plaintiffs resort to arguing the underlying dispute again. Plaintiffs make a self-serving, conclusory statement which essentially quotes this **Bowen** factor but make no real showing that their intent was to benefit all participants or to resolve a significant legal question. As set forth immediately above, in connection with the deterrent factor, there are numerous reasons why **Piccadilly's** SPD has been revised since the time this dispute arose in 1994. Further, had plaintiffs truly sought to benefit all participants, they would have sought a Declaratory Judgment and/or an injunction when this suit was initially filed. Perhaps plaintiffs could even have filed a class action in order to prevent **Piccadilly** from enforcing the terms of the SPD against other participants in this same way as it interpreted such terms in connection with this suit. See example **National Companies, 929 F.2d at 1576. See also Bowen, 624 F.2d at 1265.**

As set forth in footnote in **Harms, 984 F.2d at 694, n. 11,** "while laudable, these mainly self-interested objectives are not those we believe the ***Bowen*** Court intended to include within this factor, which favors awards for parties acting as "private attorneys general." An examination of this record demonstrates that plaintiffs sought nothing more than an extension of benefits for the sole benefit of Kasey Fallo. It is submitted that any impact on other participants in the **Piccadilly** plan was negligible, and indirect particularly in light of subsequent changes in the law. See also **Tiemeyer v. Community Mutual Insurance Company, 8 F.3d 1094 (6th Cir. 1993).**

E. The relative merits of the party's positions.

Piccadilly submits that the multiple rulings by the District Court and the ultimate holding by the Fifth Circuit Court of Appeals demonstrate a "near-equivalence of merit in the parties' positions." **Harms, 984 F.2d at 694. Piccadilly** submits that its position should not be deemed "so disproportionately meritless" that it would justify the imposition of fees. **Gibbs, 210 F.3d at 505.**

Plaintiffs cite **Wegner v. Standard Insurance Company, 129 F.3d 814 (5th Cir. 1997)** in support of their claim that this **Bowen** factor weighs in their favor. **Piccadilly** submits that the **Wegner** decision is distinguishable on a number of grounds. The **Wegner** dispute arose out of the calculation of disability benefits and the interpretation of work as "overtime" and whether certain work should be included or excluded in such calculation. Of great importance, is that in the **Wegner** case, the administrator had no discretionary authority in the interpretation of the plan and the plan was subject to *de novo* review. In the case at bar, **Piccadilly's** posture was reviewed under an "abuse of discretion" standard because the plan granted it discretion. In **Wegner**, the defendant's documents failed to support their interpretation and the Appellate Court affirmed the grant of summary judgment in favor of plaintiff. In reviewing the award of fees, the Fifth Circuit found evidence of a lack of credibility on the part of defendant. **Piccadilly** submits that this entire scenario differs greatly from that at bar. Neither the District Court nor the Fifth Circuit made such findings in this matter as to **Piccadilly.**

Plaintiffs also cite **National Companies Health Benefit Plan v. St. Josephs Hospital of Atlanta, Inc., 929 F.2d 1558 (11th Cir. 1991)**. As acknowledged by plaintiffs, the factual scenario in **National Companies** is also different than that at bar. There, the Court specifically found evidence of bad faith. The Court found it immaterial whether the company acted in good faith in the initial interpretation of ERISA finding that its change of mind, in first granting then refusing continuation coverage, evidenced an attempt to avoid its obligation and demonstrated bad faith. In the case at bar, **Piccadilly** has consistently maintained its position that the COBRA continuation coverage should not be extended. It also consistently maintained that the premiums owed exceeded the amount of claims submitted to date, until plaintiffs "finally" pointed out an error in the calculation (**Piccadilly** subsequently discovered another error which it in good faith corrected). **Piccadilly** ultimately acknowledged that it owed benefits on the additional claims based on records and information submitted some seven (7) years after the filing of the suit and at nearly nine (9) years after the claims were first incurred. See Chronology attached hereto as **Exhibit "1".**

Piccadilly submits that the facts in the case at bar are more analogous to **Holder,** *supra*, which involved an undecided factual issue and a split in the case law resulting in an administrator's incorrect interpretation of an exclusion. Further, the fact that Piccadilly prevailed initially in the District Court supports its position that its interpretation of the SPD was not groundless. See **Izzarelli, 24 F.3d at 1526.**

V. CONCLUSION ON BOWEN FEE AWARD

Piccadilly submits that based upon the totality of the circumstances, none of the **Bowen** factors weigh exclusively in favor of plaintiffs. It is respectfully submitted that an award of fees and costs in this matter is not warranted. Plaintiffs' Motion should be denied.

VI. AMOUNT OF FEES AND COSTS IF AWARDED

As set forth in the beginning of this Memorandum, **Piccadilly** challenges both the hours spent, the hourly rate and the costs incurred which plaintiffs seek to recoup. **Piccadilly** submits that assuming *arguendo* this Court awards fees and costs, the amounts sought are excessive. **Piccadilly** will endeavor to demonstrate its position to this Honorable Court but notes that a proper review would involve a detailed and expert audit of the bills submitted. Because this matter spans a seven (7) year billing history, the task is daunting. **Piccadilly** submits that should this Court decide that based on the evidence presently before it, the fees and costs as sought are to be awarded, **Piccadilly** would alternatively request additional time to present more detailed proof and evidence in support of its position. [8]

Piccadilly does not dispute that the jurisprudence requires the Court to establish a "lodestar" consisting of a determination of the *reasonable hours* expended on the litigation multiplied by a reasonable *hourly rate*. Upon arrival

---

[8] **Piccadilly** submits that by rights, the bills should be audited by a professional who should be allowed the time to carefully consider all of the charges, issue a report and be allowed to testify.

at the lodestar, this amount is presumed reasonable but should be adjusted up or down in order to account for special circumstances. See **Conner v. Midsouth Insurance Agency, Inc., 943 F.Supp. 663, 665-666 (W.D.L.A. 1996)**, and cases cited therein.

A. What is the lodestar?

Piccadilly submits that plaintiffs have failed to demonstrate, or even suggest the proper number of hours or the reasonable dollar amount per hour which should be charged. Indeed, plaintiffs have submitted no Affidavits or other evidence to support the hourly rate charged. Plaintiffs offer no evidence or explanation for the numbers of attorneys and other personnel involved in this matter. Further, significantly, plaintiffs do not acknowledge the exact dollar amount of fees which they have already recouped in connection with the Social Security proceedings. This is particularly notable with regard to those charges that they have submitted which relate strictly to the Social Security proceeding. This is pointed out in further detail below. In the final analysis, plaintiffs have failed to demonstrate how they arrived at their "lodestar."

In the case at bar, plaintiffs have merely recited the **Johnson** guidelines consisting of twelve (12) factors and submitted their billing statements, concluding that this is reasonable. Plaintiffs offer no evidence in support of their self-serving contentions that the time or hourly fees charged in this matter are reasonable and standard practice in this area. **Piccadilly** submits that the law of this circuit requires an examination of the *basis* upon which plaintiffs rely in asserting that the fees and costs were reasonable and proper.

Piccadilly challenges the initial 'lodestar" and the method by which it was arrived. The challenges fall into several categories including duplication of charges, vagueness of charges, necessity and/or accuracy and/or reasonableness of charges. Review is further complicated by the "bulk" nature of billing rendering it difficult to sort and review. **Piccadilly** counsel is not an expert but will endeavor to point out just some of the problems with the hours charged. An expert would surely uncover more.

B. Problems with the lodestar.

Piccadilly *notes that there are cost charges on a number of invoices which are not broken out or itemized rendering it impossible to ascertain whether or not such charges are related. It is respectfully submitted that under no circumstances should* ***Piccadilly*** *be assessed costs which are not considered 'taxable' pursuant to Federal Rule of Civil Procedure 54(d).*

DUPLICATION OF EFFORTS:

3/16/94: SC reviewed removal pleadings

3/22/94: SID reviewed removal pleadings

DUPLICATIVE & UNNECESSARY:

3/7/94: Inter office conference regarding the motion for extension filed by **Piccadilly**

3/28/94: SC reviewed rules regarding jury trial

3/30/94: SIC prepared revisions regarding the request

for jury trial, El reviewed filing and service requirements and drafted the request for jury trial.

Piccadilly *notes that there is no right to a jury trial in an ERISA case as set forth in the Objection to Request for Trial by Jury which it filed when a courtesy call to counsel failed to obtain their agreement to withdraw the request. Additional time was spent on the jury request on 4/4/94, 4/5/94, 4/11/94 and 4/14/94 - all for a one page pleading which should never have been filed to begin with.*

DUPLICATION OF EFFORTS:

3/31/94: SC reviewed Motion for Summary Judgment

4/4/94: SID reviewed the Motion for Summary Judgment

4/11/94: SC has a telephone conference with the Judge's office regarding continuance of the hearing and prepares and dictates a motion to continue

4/13/94: SC again has a telephone conference with the Judge's office regarding rescheduling the hearing

4/14/94: SID reviewed the Motion for Summary Judgment

4/15/94: SID 'obtained continuance'

4/20/94: SID charges for preparing pleadings regarding
continuance of the Motion for Summary Judgment

5/10/94: SID ...Telephone conference with Judge Beer's law clerk regarding continuance and obtain continuance

Piccadilly *notes again the duplicative charges listed above in April pertaining to the continuance sought on the hearing on the Motion for Summary Judgment. It is not clear what the purpose of this latest call was nor does* ***Piccadilly*** *understand what work was done when the words "obtain continuance" are used.*

VAGUE AND/OR DUPLICATIVE:

4/6/94: SID researches COBRA issues in connection with the summary judgment motion

4/12/94: SC Legal Research regarding notice requirements, onset of disability during COBRA extension

5/27/94: SID performs legal research regarding COBRA extension, date of onset and required notices

6/6/94: SID Legal research regarding opposition to motion for Summary Judgment...follow up research regarding preparation of Opposition

6/7/94: SC Additional legal research regarding .....; revision of Memorandum in Opposition; . . . Preparation of exhibits . . .

The entry immediately above is also difficult to decipher due to the fact that a number of different tasks appear lumped together in 'bulk' form with a total of 4.2 hours charged.

VAGUE:

4/13/94: SID prepares for a meeting and does "follow up COBRA research regarding disability event and extended coverage"

5/9/94: SID "work on matters pertaining to" motion for summary judgment

UNNECESSARY:

5/5/94: SC reviews ERISA provision regarding private conversion options.

Shouldn't this have been done before suit was filed? As it turned out, no opposition was raised on this issue and the claims were dismissed on the original Motion for Summary Judgment.

DUPLICATIVE:

6/6/94: SC prepares an affidavit for Clifford Olsen

6/7/94: EL drafted an affidavit for Clifford Olsen

To Piccadilly's knowledge there was only one affidavit submitted in this time frame.

6/7/94:	SC prepared exhibits to the opposition
6/8/94:	EL prepared and copied exhibits for the opposition
6/13/94:	SID began to review the reply r emorandum to the opposition to the motion for summary judgment
6/13/94	SC reviewed the reply memorandum in response to plaintiffs' opposition to the motion for summary judgment
6/14/94:	SID reviewed the reply memorandum and "prepare[d] for oral argument."
6/15/94:	SID completed review of the reply brief and had an "office conference to prepare for Oral Argument"
6/15/94:	SC prepared for and actually appeared at the oral argument.
7/8/94:	SID reviews the judgment and confers with Mr. Olsen
7/8/94:	SC reviews the judgment and confers with Mr. Olsen.

VAGUE & UNNECESSARY:

7/20/94: EL 'organized file materials and prepared a letter to Dr. McNaley regarding a medical report.

It is not clear what work was done. Further, it is unclear why plaintiffs were seeking a report at this time particularly since SC had drafted an affidavit for Dr. McNaley on 6/6/94.

DUPLICATIVE:

8/1/94: SC office conference with S. Fallo to review discovery

8/18/94: EL reviewed discovery responses from client

8/18/94: SC office conference with S. Fallo to review preliminary responses to discovery

8/19/94: SC drafts discovery responses

8/19/94: EL reviewed discovery responses from client and reviewed file material

This last entry appears vague and duplicative of the 8/1/94 and 8/18/94 office conferences with S. Fallo regarding discovery responses. Further, see the entries noted below, also pertaining to the discovery responses.

8/24/94: EL edits discovery responses

8/29/94: EL edited responses to discovery and conferred with the clients

8/30/94: EL "completed discovery responses", edited the responses some more and conferred with the client and SC

8/31/94: SC revised the discovery responses and again conferred with the clients

8/31/94: EL reviewed and organized the attachments to the responses with Ms. Cambre.

9/14/94: SC billed for receipt and review of correspondence from the undersigned

9/15/94: SC again billed for receipt and review of correspondence from the undersigned

To undersigned counsel's knowledge there was only one letter which requested supplementation of the discovery responses which were extensively billed above. Supplementation required more extensive billing for preparation of supplemental responses and additional conferences with the clients. See related charges dated 10/13/94, 10/17/94, 12/30/94.

CHARGES UNRELATED TO THE LITIGATION:

10/11/94: A .8 charge by SC includes a charge of unknown amount due to 'bulk' billing which was for discussion of the "effect of press release".

2/7/95: SID telephone conference with C. Olsen regarding "facts involving filing Social Security claim."

2/23/95: SC "Telephone conference with Cliff Olsen regarding prescriptive period on actions by municipality for zoning violations; research regarding same and obtained several cases maintaining prescription exceptions." 1.2 hours

*To **Piccadilly's** knowledge there was never a press release or a a zoning/prescription issue involved herein. Thus, it can only be assumed that these charges were billed to this file in error. **Piccadilly** does not - under any stretch of the law or facts - owe plaintiffs for unrelated legal expenses. Piccadilly notes that no invoices have been provided for any work performed between 11/1/94 and 2/1/95. **Piccadilly** reserves its rights to review such bills, assuming they exist, in order to determine if there are any other unrelated charges and/or duplicative, vague, unnecessary charges incurred. It is not clear from the pleadings and exhibits whether plaintiffs are seeking to recoup fees and costs expended in this interim. In addition, **Piccadilly** disputes any charges on any invoices, presently available for review or not, which would have been incurred in connection with the plaintiffs' claim before the Social Security Administration, a proceeding that plaintiffs were required to undertake regardless of the matters before this Honorable Court.*

SEQUENCE OF EVENTS/DUPLICATION/UNREASONABLE:

1/20/95:	SC revises a Motion to Continue
1/23/95:	EL contacts the court and counsel regarding the motion to continue and drafts a letter regarding the continuance.
1/25/95:	EL contacts the Judge and Magistrate regarding a continuance
1/27/95:	EL contacts the undersigned regarding a continuance
1/30/95:	SC drafted a Motion to continue (how could she have revised it on 1/20/95?)
2/1/95:	EL has another telephone conference with the court regarding the motion to continue

***Piccadilly** objects to the extensive time billed in connection with the Motion to Continue regarding the hearing on the reurged Motion for Summary Judgment.*

2/27/95:	SC drafts opposition to the reurged motion
3/1/95:	Interoffice conferences charged for discussion of the reurged motion. New case law is reviewed
3/6/95:	SC revised the opposition

3/6/95:	SID outlines legal arguments and shephardizes new case recently cited
3/20/95:	SID reviews the Judgment on the re-urged Motion
3/20/95:	SC reviews the order on the re-urged Motion - prepares a notice of corporate deposition

*Counsel for **Piccadilly** has not located any notice of corporate deposition in its files. Support for this charge should be submitted by plaintiffs' counsel.*

MORE SOCIAL SECURITY PROCEEDINGS CHARGES:\

*On the invoice dated 4/1/95, a number of charges pertain to the Social Security proceedings. Some, but not all, of these charges are circled and there are handwritten numbers of unknown significance on this invoice. **Piccadilly** objects to any assertion that it would owe attorneys' fees or costs incurred by the Fallos in connection with the Social Security proceedings. See charges dated 3/22/95, 3/30/95, 3/31/95. See also invoices dated 5/1/95 and charges dated 4/4/95, 4/5/95, and 4/11/95; the 6/1/95 invoice and charges dated 5/4/95, 5/5/95, 5/8/95, 5/15/95, 5/16/95, 5/23/95 (certified mail and associated costs), 5/26/95 and 5/30/95; the 7/1/95 invoice and charges dated 6/6/95, 6/7/95, 6/14/95, 6/20/95, 6/21/95, 6/26/96 (the letter for the Ochsner records in this particular reference was in connection with the social security proceedings).*

The District Court stayed the litigation between June 19, 1995 and November 19, 1996. Thus, there should virtually be no fees or costs incurred in this interim related to the litigation other than minimal correspondence and contact between counsel, *such as the charge on 7/28/95. All of the remaining charges on the invoice dated 8/1/95 should be rejected as unrelated to this litigation. Similarly, none of the charges on the 9/1/95 invoice relate to this litigation but deal entirely with the Social Security appeal. The only charge on the invoice dated 10/1/95 which is related to this litigation is the final charge for review of correspondence from counsel for* ***Piccadilly*** *and preparation of a response (.4 out of 4.05 hours). Plaintiffs should not be granted a windfall of fees for which they have already been reimbursed by Social Security.*

The 11/1/95 invoice consists of four (4) charges. Two (2) are related to this litigation and two (2) are related to the Social Security appeal and should not be assessed against ***Piccadilly.*** *These fees may already have been reimbursed by Social Security.*

As far as the invoice dated 12/1/95, ***Piccadilly*** *submits that none of the charges should be assessed against it. It is submitted that it was not appropriate or necessary or procedurally sound to seek an order from a Federal District Court purporting to require an expedited hearing by the Social Security Administration - which agency was never a party to these proceedings nor properly before the Court. Fees and costs associated with these questionable efforts should be disallowed.*

All charges on the following invoices should be rejected as relating entirely to the Social Security proceedings and in

fact may have been reimbursed by Social Security:

Invoice dated 1/2/96

*Invoice dated 2/?/96 - not submitted by plaintiffs - **Piccadilly** reserves the right to oppose*

*Invoice dated 3/?/96 - not submitted by plaintiffs - **Piccadilly** reserves the right to oppose*

Invoice dated 4/1/96 - purports to charge for time spent on 1/10/96 for correspondence from the undersigned.

*Invoice dated 5/?/96 - not submitted by plaintiffs - **Piccadilly** reserves the right to oppose*

*Invoice dated 6/?/96 - not submitted by plaintiffs - **Piccadilly** reserves the right to oppose*

Invoice dated 7/1/96

*Invoice dated 8/?/96 - not submitted by plaintiffs - **Piccadilly** reserves the right to oppose*

*Invoice dated 9/?/96 - not submitted by plaintiffs - **Piccadilly** reserves the right to oppose*

*Invoice dated 10/?/96 - not submitted by plaintiffs - **Piccadilly** reserves the right to oppose*

Invoice dated 11/1/96

Invoice dated 12/1/96 - with the exception of the final 3 fee charges, related to filing a motion for summary judgment in this matter, and the attorneys' fee issue, all charges were entirely related to the social security proceeding. ***Piccadilly*** *notes that the depositions taken and billed for on this invoice were never used or submitted in connection with this litigation and should not be assessed.* ***Piccadilly*** *also questions whether or not such costs have already been reimbursed.*

Invoice dated 1/?/97 - not submitted by plaintiffs - ***Piccadilly*** *reserves the right to oppose*

Invoice dated 2/1/97 - charges are bulk billed and include some time incurred in connection with the social security proceedings, specifically those charges dated 12/2/96, 12/6/96, 1/14/97, 1/17/97, and /28/97. Deposition costs not associated with this litigation are also included on this invoice and should be disallowed. ***Piccadilly*** *also questions whether or not such costs have already been reimbursed.*

CHARGES RELATED TO PROPER SUBMISSION OF CLAIMS/PROOF OF CLAIM:

Piccadilly submits that it is axiomatic that a plan participant or insured under a major medical policy *must* submit adequate proof of claim. It is submitted that **Piccadilly** should not be assessed the fees and costs incurred by plaintiffs in attempting to provide proof of claim to **Piccadilly**. Charges on certain invoices reflect these efforts, specifically:

Invoice dated 2/1/97: portions of charges dated 12/6/96, 12/23/96, and 1/13/97.

Invoice dated 4/1/97: portions of charges dated 2/13/97, 3/3/97, 3/4/97, 3/12/97, and 3/26/97.

Invoice dated 5/1/97: costs associated with outside copies of medical records incurred in April, presumably in connection with the Social Security Appeal.

Invoice dated 7/1/97: 6/17/97 charge by ES, 1.5 hours for "Review of billing to submit to Social Security."

DUPLICATION:

4/10/97: 2 duplicate charges by ES in the amount of 1.5 hours - identical - "Draft of summary of medical charges; copy medical bills for filing with court; revise Kasey Fallo affidavit to include medical and attorney charges;"

7/30/97: SC Receipt and review of ruling on summary judgment

8/4/97: SC Receipt and review of ruling on summary judgment

8/20/97: SC Receipt and review of filed Notice of Appeal

8/21/97: SC Receipt and review of Notice of Appeal filed in Eastern District

10/30/97: SC revises the appellate brief

10/30/97:SID revises the appellate brief

10/31/97:SC revises the appellate brief

10/31/97:SID "proof(s)" the brief and meets with SC for final revisions

10/29/97:*This is an "out of sequence" charge by SC which is also vague and potentially duplicative:* "Preparation of Appellate Brief; preparation of excerpts from record;" *See final entry of invoice dated 11/1/97'.*

11/3/97: SC "Finalized and executed Brief . . . filing of same; 2.1 hours.

In light of the time already expended, this last charge appears excessive. See also the 1.0 charge which follows indicating that Legal Leggs was retained to "file" the brief.

CHARGES RELATED TO ERRORS IN FILING:

Apparently, counsel for the plaintiffs made some error in connection with the filing of the appellate brief. ***Piccadilly*** *submits that under no circumstances would it be reasonable to assess it with fees resulting from the errors of counsel. See specifically the invoice dated 1/1/98, charges dated 11/5/97, 11/6/97.*

CHARGES PERTAINING TO ENROLLMENT OF COUNSEL:

8/25/97: ES draft application for admission to 5th Circuit, etc.

9/16/97: SC telephone conference regarding enrollment form

***Piccadilly** submits that it should not be assessed fees incurred in connection with counsel's enrollment before the 5th Circuit.*

MORE CHARGES RELATED TO OTHER MATTERS:

11/24/97:SID "Review of Judge Berrigan's Written Reasons; discuss with Mr. Olsen and strategize regarding certifying to Fifth Circuit." .5

11/3/99: VO "Preparation and dictation of correspondence requesting medical records and wills." .3

***Piccadilly** knows of no decision issued by Judge Berrigan in this matter, nor does it have any knowledge of any certification to the Fifth Circuit. To Piccadilly's knowledge no one passed away and there would be no reason to request a will in connection with this litigation. These fees should not be assessed.*

DUPLICATION OF EFFORT/EDUCATION OF NEW COUNSEL:

In January of 1999, invoice dated February 1, 1999, a new set of initials appear on the invoices. This person bills for extensive research and review of correspondence, discovery, file materials, standard of review, and legal fees, much of which has previously been billed by other counsel. It appears that "PP" is 'getting up to speed'. **Piccadilly** should not pay for the reeducation of counsel in the same firm.

In the July 1, 1999 invoice, the initials for Vicki Olson appear for the first time. More inter-office conferences are charged. Ms. Olson also appears to be 'getting up to speed' during the months of July and August, 1999. See invoice dated September 1, 1999.

Further file review and legal research regarding the attorneys' fee issue is then repeated yet again when present counsel for the Fallos, Ms. Davis, takes over the file in August of 2000. See invoice dated September 1, 2000.

MORE MISSING INVOICES:

It is again noted that some invoices are not included in plaintiffs' submissions and it is unclear if this is because no fees/costs were incurred in this time frame, or, if in fact fees and costs are sought but the proof is lacking. **Piccadilly** reserves its rights to review and contest such invoices should they exist. Specifically, no invoices have been submitted for the months of October through December of 1998, nor for March, April, June, August or October of 1999. There are two (2) separate invoices dated November 1, 1999 though the charges do not appear to be the same. There are also no invoices for March, July or December of 2000. It is noted, however, that some charges for the missing months appear in the invoices which have been submitted.

PROPER SUBMISSION OF CLAIMS/PROOF OF CLAIM:

Piccadilly again submits that it should not be assessed the fees/costs associated with plaintiffs attempts to submit proper proof of claim. It disputes those associated charges dated

3/13/00, 3/15/00, 4/24/00, 4/25/00, 5/1/00, 5/18/00, 10/5/00, 10/18/00, 12/7/00, and 2/7/01.

VAGUE/CHARGES INDECIPHERABLE:

1/3/00: VO "Receipt and review fee for medical records; Preparation and dictation of order regarding same." .2

10/20/00:MMD "Search file" .5

DUPLICATION OF CHARGES:

2/16/00: VO Preparation and dictation of Responses to Defendant's Discovery 1.0.

Immediately above this charge, which appears on the April 1, 2000 invoice, there appears an identical, though undated charge for a .5 See also the vague - 'bulk' - charge dated 2/17/99 which includes "work on responses to defendant's discovery"

2/18/00: VO charges again for preparation and dictation of discovery responses 1.0

3/9/00: VO "Respond to discovery request..." 1.0 (*vague and possibly duplicative of other entries/efforts).*

3/22/00: VO "work on discovery for defendant" 2.5

3/23/00: VO again charges for preparation and dictation of discovery responses 1.0

3/24/00: VO continues preparation of discovery responses

3/27/00: VO Reviews discovery responses; prepares correspondence to undersigned counsel for **Piccadilly**

3/28/00: VO Finalizes discovery and forwards to the undersigned

THE QUEST TO RECOUP FEES/DUPLICATION/EXCESSIVE:

8/8/00: MMD Legal research . . . 2.05

8/22/00: MMD Legal research . . . 1.5

8/24/00: MMD Legal research . . . Preparation of motion 2.5

8/25/00: MMD Preparation of Memorandum 2.5

8/28/00: MMD Preparation of memorandum 2.5

8/28/00: MMD "Legal research regarding cases from Westlaw." 1.0 (***Piccadilly*** *submits this charge is rather vague and meaningless*).

8/31/00: MMD Legal Research . . . 2.0

9/18/00: MMD Preparation of draft of Motion 5.75

9/19/00: MMD "Work on memorandum . . ." 3.0

9/20/00: MMD "Work on memorandum. . . " 3.5

9/21/00: MMD "Work on attorneys fees and costs;" 3.0

9/22/00: MMD "Work on attorneys fees and costs;" 4.3

9/25/00: MMD "Continued Memorandum . . ." 4.75

9/26/00: MMD "Finalization of draft of Memorandum . . ." 3.25

A total of 39.1 hours were spent in August and September alone on this matter presently before the Court. This does not include the legal research time spent by others on this same issue over the preceding months.

Piccadilly submits that on the evidence presently before it, it is impossible to determine the "lodestar." What can be concluded, however, is that in the charges presently before the Court, as submitted by plaintiffs, there are numerous duplications, vague charges, potentially excessive charges, and unnecessary and unrelated charges. **Piccadilly** should not be assessed the amounts sought by plaintiffs, particularly in light of their recoupment of some of the fees through the Social Security proceeding, a fact omitted from their brief.

C. <u>The Johnson factors.</u>

Piccadilly submits that an examination of the **<u>Johnson</u>** guidelines cannot be accomplished until the Court first arrives at the "lodestar." **Piccadilly** does submit, however, that the **<u>Johnson</u>** guidelines can be used in part to examine whether or not the number of hours incurred were reasonable. **Piccadilly** submits that the first four (4) **<u>Johnson</u>** factors regarding the time and labor required, the novelty and difficulty of the question, the skill requisite to

perform the service properly and the preclusion of other employment by the attorney would all weigh in favor of reducing the lodestar. **Piccadilly** respectfully refers this Honorable Court to the Chronology of Events, **Exhibit "1"**, and the billings review detailed above in this regard.

With regard to the fifth **Johnson** factor, the customary fee, the Court simply has no evidence before it. The only thing presented has been a bald conclusory statement in the Memorandum. The fee in this matter was fixed at an hourly rate. This is what was in fact charged. Had the fee been contingent on the recovery, such fee could have been determined as follows:

1/3 of gross benefits recovered (no interest) ($31,580.76) = $10,516.39.

Another manner of calculating a contingency fee award may have been as follows:

1/3 of gross benefits plus judicial interest ($49,410.56) = $16,453.72.

Another alternative calculation could be as follows:

1/3 of gross benefits including interest, less the premiums, plus interest ($45,236.79) = $15,063.85.

Another final alternative might have been to perform the calculations as follows:

1/3 of gross benefits ($31,580.76) minus gross premiums ($2,067.67) [$28,913.09] = $9,628.06.

Thus, had this fee been contingent, much less in the way of fees would have been recovered. This also plays into the eighth **Johnson** factor, the amount involved and the results obtained.

With regard to factors seven (7), the time limitations imposed, nine (9), the experience, reputation and ability of the attorneys, and eleven (11), the nature and length of the professional relationship with the client, we simply have no evidence before us. **Piccadilly** has no reason to suggest anything negative with regard to the experience, reputation and ability of the attorneys. Plaintiffs have submitted no evidence with regard to any time limitations or the nature and length of the professional relationship with Mr. Olsen, though, because unrelated charges appeared on these bills, it does appear that the plaintiffs have an ongoing relationship with this client.

Similarly, plaintiffs have submitted no evidence in connection with factor twelve (12), awards in similar cases.

The only factor that has not been addressed, factor ten (10), the undesirability of the case, is moderately difficult. In hindsight, **Piccadilly** has no doubt that all parties and all counsel involved in this lengthy litigation have in the past or presently do find it undesirable. However, it is suggested that this factor bears upon whether or not the case was desirable when it was first brought to plaintiffs' counsel. **Piccadilly** submits that in all likelihood, it did appear to be an initially easy case, one quickly handled.

VII. CONCLUSION

Piccadilly reiterates that it does not believe it

should be assessed fees or costs in connection with this matter. Nevertheless, assuming this Honorable Court, in its discretion, determines that fees and costs are owed by **Piccadilly** to plaintiffs, then **Piccadilly** submits that the amounts sought are excessive and not supported by the evidence presently before the Court.

VIII. PRAYER FOR RELIEF

For the foregoing reasons, **Piccadilly Cafeterias, Inc.** respectfully submits that an examination of the entirety of this record, and the evidence presently before the Court should result in a denial of the plaintiffs' Motion in its entirety. In the alternative, as set forth herein, **Piccadilly** prays that the Court finds the fees and costs sought to be excessive and unwarranted under the totality of the circumstances. **Piccadilly** further alternatively prays for the opportunity to submit additional evidence with regard to the amounts of fees and costs.

Respectfully submitted,
HAILEY, McNAMARA, HALL, LARMANN & PAPALE, L.L.P.

BY: s/_____

JOHN T. CULOTTA (#17272)
JULIE DiFULCO ROBLES (#14213)
One Galleria Blvd., Suite 1400
Post Office Box 8288
Metairie, Louisiana 70011-8288
(504) 836-6500
Attorneys for Defendant,
PICCADILLY CAFETERIAS, INC.

CERTIFICATE OF SERVICE

I hereby certify that I have on 7th June , 2001 served a copy of the foregoing pleading on all known counsel for all parties to this

via hand delivery

proceeding, ~~by mailing same by United~~ States mail, properly addressed and first class postage prepaid.

s/_____

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SCOTT FALLO and KASEY FALLO	*	CIVIL ACTION NO. 94-0907
	*	
versus	*	SECTION "M"
	*	
PICCADILLY CAFETERIAS, INC.	*	MAGISTRATE: (2)

****

CHRONOLOGY OF THE LITIGATION

DATE	EVENT
February 10, 1994	Suit filed in CDC, New Orleans asserting claims for indefinite benefits, the ADA, negligence and punitive damages.
February 23, 1994	Piccadilly Cafeterias, Inc. served with Citation, Petition and Discovery.
March 17, 1994	Piccadilly removed case to Federal Court on basis of ERISA. Answer filed. Piccadilly responded to Plaintiffs' Discovery

April 4, 1994	Original Motion for Summary Judgment filed by Piccadilly **(Exhibit "A")**
April 20, 1994	Motion for Summary Judgment set for hearing, continued at request of plaintiffs' attorney. **(Exhibit "B")**
June 8, 1994	Plaintiffs filed a Memorandum in Opposition to Motion for Summary Judgment.
June 13, 1994	Reply Memorandum filed by Piccadilly. **(Exhibit "C")**
June 15, 1994	Hearing on original Motion for Summary Judgment
July 7, 1994	Court issued Order on Original Motion for Summary Judgment. Motion granted in part and denied in part. **(Exhibit "D")**
July 15, 1994	Counsel for the parties discussed settlement and counsel for Piccadilly requested all medical expense information. **(Exhibit "E")**
July 26, 1994	Piccadilly issued formal discovery to plaintiffs, seeking, among other items, complete

	information regarding medical treatment and expenses. **(Exhibit "F")**
August 11, 1994	Plaintiffs obtained extension on discovery responses until August 31, 1994. **(Exhibit "G")**
September 1, 1994	Plaintiffs filed incomplete responses to discovery.
September 7, 1994	Piccadilly requested additional information on medical expenses. **(Exhibit "H")**
September 7, 1994	Piccadilly requested Social Security Administration file. **(Exhibit "I")**
September 21, 1994	Piccadilly advised by plaintiffs that additional information would be provided.
September 26, 1994	Piccadilly again advised that additional information would be provided.
October 11, 1994	Piccadilly continued to request information from plaintiffs. **(Exhibit "J")**
October 13, 1994	Supplemental Responses to Discovery received. **(Exhibit "K")**

October 14, 1994	Piccadilly again requested Social Security Administration file. **(Exhibit "L")**
November 1, 1994	Piccadilly again requested Social Security Administration file. **(Exhibit "M")**
December 21, 1994	Social Security records finally received by Piccadilly.
January 5, 1995	Social Security records forwarded to counsel for plaintiffs. **(Exhibit "N")**
January 10, 1995	Piccadilly filed a Motion reurging the Motion for Summary Judgment Motion set for hearing on February 22, 1995. **(Exhibit "O")**
January 10, 1995	Plaintiffs requested Status Conference for the purpose of obtaining deadlines and a trial date.
January 24, 1995	Plaintiffs requested continuance of the hearing. **(Exhibit "P")**
February 8, 1995	Plaintiffs Status Conference held. Trial scheduled for August 3, 1995.
February 27, 1995	Piccadilly filed a Supplemental Memorandum in Support of the reurged Motion. **(Exhibit "Q")**

March 9, 1995	Plaintiffs filed an Opposition to the reurged Motion.
March 17, 1995	Motion for Summary Judgment denied. (**Exhibit "R"**)
March 24, 1995	Social Security Administration issued initial denial of benefits. (**Exhibit "S"**)
May 1, 1995	Piccadilly moved to stay the proceedings pending a determination by the Social Security Administration on appeal. (**Exhibit "T"**)
June 19, 1995	Stay Order issued by the Court. (**Exhibit "U"**)
June 19, 1995 through November 19, 1996	**Stay continued in force due to lack of decision by Social Security Administration.**
September 13, 1995	Piccadilly advised by Covington - Social Security Administration office that no appeal had been timely filed. Counsel for Piccadilly corresponded to plaintiffs requesting dismissal.
September 15, 1995	Counsel for plaintiffs advised that in fact an appeal had been perfected on the Social Security Administration denial.

September 26, 1995	Piccadilly requested updated records from the Social Security Administration. No hearing set by Social Security Administration until October 24, 1996. **(Exhibit "V")**
October 24, 1996	Social Security Administration continued hearing set this date.
November 19, 1996	Social Security Hearing reset for this date and actually held.
November 27, 1996	Social Security appeal ruled in favor of Kasey Fallo "based upon application of April 14, 1994". Piccadilly unaware of this decision at this time. Decision became final January 26, 1997.**(Exhibit "W")**
December 4, 1996	Piccadilly requested plaintiffs advise of the outcome of the Appeal because had not been apprised by plaintiffs. **(Exhibit "X")**
April 11, 1997	Plaintiffs moved to reopen the matter and filed Motion for Summary Judgment.
May 6, 1997	Piccadilly filed Opposition and Cross-Motion forSummary Judgment. Motions submitted on brief. **(Exhibit "Y")**

July 28, 1997	Court ruled in favor of Piccadilly on Motions for Summary Judgment. Judgment entered August 14, 1997. **(Exhibit "Z")**
August 19, 1997	Plaintiffs filed Notice of Appeal.
November 3, 1997	Plaintiffs filed Appellate Brief
December 3, 1997	Piccadilly filed its Brief on appeal.
December 3, 1997 through April 7, 1998	**Case remained pending on Plaintiffs' Appeal**
April 7, 1998	Counsel agreed to submit on appeal on briefs.
May 29, 1998	Case reversed and remanded to "determine the amount of the premiums owed by the Fallos to Piccadilly." **(Exhibit "AA")**
March, 1999	Kasey Fallo's father sent inappropriate note directly to Piccadilly President and CEO. **(Exhibit "BB")**
March 9, 1999	Piccadilly counsel forwarded letter requesting plaintiffs to avoid direct contact with Piccadilly and requested dismissal. **(Exhibit "CC")**

August 3, 1999	Plaintiffs requested Status Conference. Plaintiffs' claims now handled by Vickie Olson. Status Conference held September 14, 1999.
September 22, 1999	Plaintiffs issued subpoenas for medical records. Copy of subpoena not received by Piccadilly counsel until October 1, 1999.
September 23, 1999	Counsel for Piccadilly corresponded to counsel for plaintiffs advising that research would be needed because "this matter has been dormant for some time."
October 15, 1999	**Counsel for Piccadilly and counsel for plaintiffs met face-to-face to discuss the issues. For the first time, Plaintiffs' counsel pointed out an inadvertent error in premium calculation. Plaintiffs' counsel agreed to provide medical records and invoices not previously provided to Piccadilly.**
November 1, 1999	**Plaintiffs forwarded medical records not previously provided and further forwarded East Jefferson**

	invoices "for consideration for payment". (Exhibit "DD")
December 13, 1999	Plaintiffs sent some billing records from some providers but advised **"still waiting for billing records from Ochsner Clinic" and "waiting for copies of additional invoices (from LSU Medical Center)."** Records and billings from Ochsner Hospital, Centre for Pain Relief and Upledger forwarded in this package. **(Exhibit "EE")**
January 27, 2000	Piccadilly sent formal discovery to plaintiffs. **(Exhibit "FF")**
March 20, 2000	Piccadilly counsel corresponded to counsel for plaintiffs requesting additional information and requesting a response to formal discovery. **(Exhibit "GG")**
March 27, 2000	Parties filed Joint Motion to Continue Trial. Plaintiffs join in statement: **"Despite due diligence, requests for some of these records are outstanding." (Exhibit "HH")**

March 28, 2000	Plaintiffs forwarded formal responses to discovery - disputed amount of premium due. **Plaintiffs "awaiting billing records from Ochsner Clinic." (Exhibit "II")**
April 2, 2000	Plaintiffs forwarded the billing records from Touro Rehabilitation and advised **"[b]elieve it or not, I am still awaiting billing records from Ochsner Clinic" (Exhibit "JJ")**
May 8 and 9, 2000	Counsel traded e-mails pertaining to the outstanding invoices from Ochsner Clinic. **Piccadilly counsel advised plaintiffs' counsel that in order to get final numbers, all the bills must be provided.(Exhibit "KK")**
May 11, 2000	Piccadilly counsel corresponded to counsel for plaintiffs regarding the need for all billing records and reiterated the explanation that Piccadilly would generate statements as to each claim once all billings had been submitted. **(Exhibit "LL")**

May 22, 2000	The parties prepare another Joint Motion to Continue trial presently set for June 26, 2000. **Plaintiffs again join in statement that "some of these records remain outstanding." (Exhibit "MM")**
May 30, 2000	Plaintiffs forwarded billing records from Ochsner Clinic "(finally!)" and the Social Security file requested in discovery. **(Exhibit "NN")**
June 5, 2000	Trial continued and a Status Conference set for October 18, 2000.
August 22, 2000	Counsel for plaintiffs enrolled new attorney, Michelle Davis.
September 18, 2000	Plaintiffs counsel corresponded to Piccadilly counsel requesting information on the premium calculations and **acknowledging that the premium and benefits payable figures may have changed and "are presently being updated." (Exhibit "OO")**
September 27, 2000	Piccadilly's counsel acknowledged correspondence of September 18, 2000 and advised that she believed the

	premium calculation information had previously been provided and the benefit calculations would be forwarded upon receipt. **(Exhibit "PP")**
October 2, 2000	Piccadilly counsel advised plaintiffs' counsel of the need for additional information concerning the Ochsner Clinic billings and based on the information submitted is "unable to process" the non-itemized statements. "Were we to give you totals at this time, the Ochsner items would be denied based on insufficient proof of claim." **(Exhibit "QQ")**
October 2, 2000	Counsel for plaintiffs corresponded to counsel for Piccadilly re-requesting the premium information. **". . . I cannot find the information and documentation in our file and would appreciate your forwarding duplicate copies of same. Given that the file is over six years old, I am surprised that I can find anything!" (Exhibit "RR")**
October 5, 2000	In separate correspondence counsel for plaintiffs forwarded copies of the itemized bills

	believed to have been previ ously sent. This correspon dence further stated **"I have reiterated my request to Ochsner Clinic regarding a detailed, itemized state- ment... Hopefully, this will do the trick." (Exhibit "SS")**
October 5, 2000	Piccadilly counsel provided the requested information to plaintiffs' counsel. At that time confirms **"As discussed with Vickie Olson, and as I have advised you, the fig- ures in Jeanita Slaton's orig- inal Affidavit have changed due to 1) an error that we noted in the calculation of premiums, and 2) due to additional information sub- mitted by your office." (Exhibit "TT")**
October 18, 2000	Status Conference held at which time plaintiffs' counsel advised they were to issue another subpoena duces tecum to Ochsner. Trial set for March 5, 2001 with Pre - Trial Conference scheduled for February 22, 2001.
October 20, 2000	Plaintiffs' counsel forwarded letter stating that the Ochsner

	records were previously forwarded on May 30, 2000.
November 21, 2000	Piccadilly counsel telephoned counsel for plaintiffs and advised of a problem processing the Ochsner Clinic records because of the coding and the dates of service. Counsel for plaintiffs agreed to check with Ochsner and get back to Piccadilly.
November 22, 2000	Counsel for plaintiff advised Piccadilly counsel by telephone that she had not heard from Ochsner.
December 5, 2000	Piccadilly counsel corresponded to plaintiffs' counsel "have you been able to confirm with Ochsner that the asterisk (sic) items indicate dates of service on the statement?" **(Exhibit "UU")**
December 8, 2000	Counsel for plaintiffs clarified Ochsner Clinic statement dates in telephone conversation with Piccadilly counsel.
January 30, 2001	By telephone, counsel for Piccadilly advised counsel for plaintiffs that her client was having difficulty processing the claims due to Piccadilly

	experiencing computer and printer problems. Additionally, because of the age of the claims, the need to recreate coding information from 1994, and the need to "suspend" the claims Piccadilly was having trouble processing the newly submitted claims.
February 1, 2001	Counsel for Piccadilly corresponded to counsel for plaintiffs that the review had been completed and prior to issuing payment to the Fallos, Piccadilly needed proof of payment/protection from any medical liens. Premium recalculation information also provided. (**Exhibit "VV"**)
February 5, 2001	Counsel for plaintiffs questioned some of the explanations and calculations of benefits.
February 6 and February 7, 2001	Counsel for plaintiffs and Piccadilly spoke by tele phone, forwarded information via e-mail and facsimile. Counsel also compared and clarified some differ ences in amounts. By correspondence dated February 6, 2001, **Plaintiffs**

	submitted additional information regarding some of the denied charges and advised "I have not found any record of Vicki Olson having forwarded these to you...".(Exhibit "WW")
February 7, 2001	Plaintiffs' counsel forwarded correspondence advising that she had **"been in contact with Dr. Hages' office, and they will call me with an explanation as to the hand writing on the billing as well as send me a copy of the coded billing."(Exhibit "XX")**
February 13, 2001	Counsel for Piccadilly forwarded correspondence responding to questions presented by counsel for plain tiffs and attaches Explanation of Benefit forms concerning submitted charges. Further explanation regarding the pre mium calculations provided. Offer to settle made. **(Exhibit "YY")**
February 15, 2001	Counsel for plaintiffs for warded correspondence questioning the calculation of cer tain benefits.

February 19, 2001	Counsel for Piccadilly responded to questions and advised that Piccadilly had agreed to accept charges previously denied due to issues pertaining to CPT coding from1993/1994.
February 21, 2001	Piccadilly counsel forwarded additional Explanation of Benefit forms based on the newly accepted charges. Facsimile received from counsel for plaintiffs regard ing settlement. Counsel speak regarding settlement.
February 22, 2001	Counsel for plaintiffs for warded settlement offer. **"[C]urrent benefits due . . . Amount to $31,580.76."** Plaintiffs agreed to premium recalculation.
February 28, 2001	Settlement confirmed by correspondence. **Piccadilly agrees to pay judicial inter est from the date of the filing of suit through March 5, 2001, in the additional amount of $17,829.80. (Exhibit "ZZ")**
March 2, 2001	Piccadilly forwarded funds and Receipt and Release to counsel for plaintiffs. Joint Motion to Refer to a Magistrate filed.